

**IN DEFENSE OF A DEMOCRATIC ACCOUNT OF
HUMAN RIGHTS**

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In Defense of a Democratic Account of Human Rights

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The background painting is Vincent Van Gogh, *Wheatfield under Thunderclouds* (1890)

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**IN DEFENSE OF A DEMOCRATIC ACCOUNT OF
HUMAN RIGHTS**

**EEN VERDEDIGING VAN DE DEMOCRATISCHE THEORIE
VAN MENSENRECHTEN**

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Introduction

1 Everyday rights struggles

One can say, perhaps with some exaggeration, that the discourse of human rights has become pervasive in contemporary politics. As is widely acknowledged, the language of human rights, especially after the end of the Cold War, has been the *lingua franca* of moral and political claim-making. The labor movement, civil rights movement, feminist movement and LGBT (lesbian, gay, bisexual and transgender) movement attest to the efficacy of the language of human rights. At the same time, the notion of rights is frequently invoked in various contexts and practices ranging from the foreign policy of powerful states to the activism of international NGOs, from indigenous movements and even to advertisements.¹ As well as the diversity of the contexts in which the notion of a right is invoked, there is also an increasing diversity in the objects of rights (what those rights are rights *to*) such as the right to holidays with pay, the right to peace and recently the right to be forgotten.²

This ‘success’ of human rights in the sense of its popularity in public discourse (bolstering divergent aims ranging from the political ends of global powers to emancipatory aims of social movements to marketing aims of advertisements) is paradoxically accompanied by the ‘failure’ of the philosophical analysis of human rights which is characterized by persistent disagreements about the moral content and political efficacy of human rights. While

¹ For example in his Nobel Peace Prize Speech in 2009, President Obama emphasized the centrality of human rights in US foreign policy stating “Agreements among nations. Strong institutions. Support for human rights. Investments in development. All these are vital ingredients in bringing about the evolution that President Kennedy spoke about.” Accessed on 30 December 2014 at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>. In a totally different area of life, the commercial for Sanex deodorant declared our underarm skin has three fundamental rights. The ad is available here: https://www.youtube.com/watch?v=gWw7VCXWHhE&feature=player_embedded (Accessed on 8 January 2015).

² In its ruling of 13 May 2014 the European Union’s Court of Justice said: “On the ‘right to be forgotten’ : Individuals have the right - under certain conditions - to ask search engines to remove links with personal information about them. This applies where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing (paragraph 93 of the ruling). The court found that in this particular case the interference with a person’s right to data protection could not be justified merely by the economic interest of the search engine. At the same time, the Court explicitly clarified that the right to be forgotten is not absolute but will always need to be balanced against other fundamental rights.” European Factsheet on “The Right to be Forgotten” ruling (C-131/12). Accessed on 6 January 2015 at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf. For the sake of simplicity, I use the term ‘rights’ to mean ‘human rights’ in this introduction. As the dissertation proceeds it will become clearer how the term ‘right’ needs to be qualified to count as a human right. The increase in the number of items in the lists of human rights, which is sometimes called the inflation of rights, is problematized by philosophers. See for example, James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 92–93, 175.

different and sometimes divergent notions are proposed as the underlying moral premises of the idea of human rights such as universal human interests, dignity, freedom, or basic capabilities, there is at the same time persistent skepticism about the philosophical coherence and political efficacy of the 'rights talk'. This skepticism is raised by both supporters and opponents of human rights discourse. Supporters are concerned about the inflation and consequent debasement of human rights language whereas opponents of rights discourse are critical of the whole framework of rights talk because they believe it is individualistic or that it reflects and sustains existing forms of dominance.³

One striking feature of this debate about the morality and political efficacy of human rights, which initially inspired this dissertation, is the absence from the theoretical discussion of human rights of the voices of those who are claiming their rights. When theorists propose arguments for and against rights or when they try to envisage a future for rights in contemporary theory and politics, they do not usually do it from the viewpoint of those who struggle for rights. Where are the *humans* in all this talk about human rights? Who is the subject of human rights? We are familiar with the idea of universal human rights belonging to *all* people but what does it mean for actual people, with flesh and bones, in their everyday practices to *have* those rights?

An immediate objection to my concern that the voices of those involved in rights struggles are absent from philosophical discussions might take the following form. Scholarly work in general takes and arguably should take a neutral standpoint which treats social phenomena as neutral data for systematic observation and philosophy is not an exception to this rule. In addition, political theory is different from real politics: it is concerned with abstract moral principles and values, hence with political ideals removed from empirical contexts, whereas real politics is about strategic behavior, winning elections, political feasibility, etc. Political theory takes and should take a neutral position with respect to real politics and instead be concerned with abstract principles that inform the policies. For instance, Swift and White argue that not all urgent practical problems are philosophically interesting since what is wrong with the most serious problems in the world is often obvious; in those cases the values and principles at stake are so stark that there is little normative interest for philosophical discussion.⁴ They give the example of sex trafficking; although it is a problem of great importance there is not much room for political theory to contribute

³ I will examine the critique of the whole framework of human rights in chapter 5.

⁴ Adam Swift and Stuart White, "Political Theory, Social Science, and Real Politics," in *Political Theory: Methods and Approaches*, ed. David Leopold and Marc Stearns (Oxford: Oxford University Press, 2008), 49–69.

towards any interesting analysis regarding to sex trafficking. The values at stake are clear and it is unlikely that many normative theorists will be found defending the practice. One can, along these lines, claim that rights struggles might be urgent and important but that they nevertheless are not philosophically interesting, as it is obvious at the level of normative principles that all people should enjoy human rights. One may therefore draw the conclusion that including the voices of people engaged in rights struggles does not make a difference or improvement to theorizing about human rights.

My response to such objections proceeds along two lines. Firstly, it is not the only position in philosophy and even in science that a neutral stance is and should be taken. One can deny that such a neutral position can and should be taken with respect to practical issues and problems in societies. Secondly, it is not always the case that philosophically interesting questions are only those related to the policy implications of abstract political and moral theories. Political theories, as Swift and White also acknowledge, can also devote more attention to how individuals or groups of individuals react to already existing policies rather than to questions of what policies should be pursued by the government. In rights struggles, about which I will say more soon, people react to already enacted government policies by making a claim that those policies violate their rights.

Within rights struggles, people claim in their everyday practice that they have such-and-such rights when they face a *serious threat* to their exercising those rights. These struggles are characterized by outrage raised by some based on the claim that their rights are violated. There is conflict and contestation over whether people are *justified* in claiming that they have those rights. In other words, the *human* in human rights appears on stage when there is a *struggle* over rights. This dissertation is a philosophical engagement with that initial question. It is about human rights and the ways in which the idea and language of human rights are used in real-life rights struggles. By real-life rights struggles I mean political conflicts and contestations during which claims against the political and social order are made in the *currency* of rights; both as a resource for critique (basic rights are violated) and as goals to be pursued (everyone should have those basic rights and they should be in place).

Let me give an initial sense of real-life rights struggles with the some examples of conflicts in which claims are made in terms of (human) rights:

In the late 90s, as part of a larger, nation-wide, privatization project prompted by pressure from international financial institutions, the Bolivian government sought private investor

financing to improve the water supply system infrastructure.⁵ Shortly thereafter, officials in the city of Cochabamba in Bolivia sold its municipal water company SEMAPA to the transnational consortium Aguas del Tunari, controlled by the U.S. company Bechtel. Bechtel increased water rates for SEMAPA customers to \$20 USD monthly, a 35 to 50 percent increase.⁶ This high rate of increase in water prices combined with a local law extending Bechtel's control of water resources to the city's southern expansion and surrounding rural communities (regions outside SEMAPA jurisdiction) triggered a series of demonstrations and protests taking place in the city of Cochabamba between December 1999 and April 2000. A diverse group of civilian protestors coordinated their response to these policies in a movement that framed water privatization as a violation of basic human rights. The Bolivian government responded to the citizen protests by terminating the privatization concession and restoring government control over the water supply system in Cochabamba.⁷ While some have decried this case as an illustration of the inherent flaws of privatizing water-supply systems, others have charged that its failings were in application, not in theory.⁸ The Cochabamba Declaration that arose out of the water crisis confirms, however, that some communities consider *water to be a basic human right*, and not purely an economic good.⁹

The next two examples of rights struggles are from Turkey. The first one is *the right to housing* struggle of a group of residents of Dikmen Valley in Ankara who have been refusing, from 2005 to the present day, to leave their dwellings to facilitate the implementation of an urban transformation project in the area. They are claiming that 'people have a right to

⁵ Erik B. Bluemel, "The Implications of Formulating a Human Right to Water," *Ecology Law Quarterly* 31 (2004): 965–966.

⁶ Ship Bright, "Privatization, Globalization and Economic Water Scarcity." September 21, 2009. Global Fresh Water. <http://shipbright.wordpress.com/2009/09/21/privatization-globalization-and-economic-water-scarcity> (Accessed on 8 January 2015).

⁷ See Geraldine Dalton, "Private Sector Finance for Water Sector Infrastructure: What Does Cochabamba Tells Us About Using This Instrument?," *School of Oriental and African Studies (SOAS) Water Issues Study Group, Occasional Paper* No. 376 (2001). Available at <https://www.soas.ac.uk/water/publications/papers/file38380.pdf>. (Accessed on 8 January 2015).

⁸ See, e.g. Dalton, "Private Sector Finance for Water Sector Infrastructure."

⁹ See Juan Miguel Picolotti, "The Right to Water in Argentina" (2003), available at http://www.righttowater.info/wp-content/uploads/argentina_CS.pdf (visited 8 January 2015). See also Cochabamba Declaration, Adopted by the participants in the Conference, "Water, Globalization, Privatization and the Search for Alternatives, Cochabamba, Bolivia December 8, 2000. ("Water is a fundamental human right and a public trust to be guarded by all levels of government, therefore, it should not be commodified, privatized or traded for commercial purposes."), available at <http://www.nadir.org/nadir/initiativ/agp/free/imf/bolivia/cochabamba.htm#declaration>. (Accessed on 8 January 2015). Although international human rights law has not yet created legally binding obligations on States to recognize a human right to water, it has served to pressure some States into more fully developing a human right to water. The water-stressed countries of South Africa, India, and Argentina all provide a right to water, derived from constitutions, statutes, judicial interpretations, and, in some instances, international human rights instruments. For a comparison of these domestic experiences for the implementation of the right to water, see Bluemel, "The Implications of Formulating a Human Right to Water," 977–985.

housing' and that they are and will be fighting for this right. Another example is the resistance of a group of workers of TEKEL (the former state-owned enterprise of tobacco and alcoholic beverages) against the loss of their pay and social rights due to a change in their contracts of employment after the privatization of the TEKEL enterprise. In December 2009, workers of the enterprise from 21 cities across Turkey gathered in Ankara, the capital city, occupied one of the city's central squares and lived in makeshift tents for 78 days and campaigned in the streets for their *rights to a decent job*.¹⁰

These are just some examples of the many contemporary conflicts in which a rights claim is raised. They are instances of heated political situations in which a group of people protests against the policies imposed on them, claiming that those policies are unjustified and violating their basic rights. They protest by making an explicit or implicit rights claim (right to water, right to housing, right to work, etc. either as a supplement to another human right i.e. right to life or adequate standard of living, or as a separate human right).

The participants in what I have called everyday rights struggles—situations of social conflict and contestation in which a demand for human rights is made or an outcry is raised that the rights of some are violated—face this question of *what it means* to have such-and-such rights and the efficacy of rights talk for social change in their day-to-day political practice (perhaps implicitly and provisionally). These people take the policies and conditions imposed on them by the political authorities to be illegitimate and violating their basic rights (to work, to adequate housing, etc.) and they protest against those policies. For the people participating in these rights struggles, the question of whether they have those rights is a question of lived experience, a question asked in practical contexts or situations. They face the question of whether they are *justified* in claiming those rights in practice. What does it mean that a person (or a group of people) is *justified* in claiming a right? This is the first main question of this dissertation.¹¹

However, posing the question what people assume when they claim that they have a right in their day-to-day political practice, raises a second question in view of the philosophical

¹⁰ For a more detailed discussion and references of the last two cases of rights-struggles in Turkey, see chapter 1.

¹¹ One can argue that there are in fact two questions here: 1) what it means to struggle for rights or claim them in practice and 2) when these claims are *justified*. Are these, perhaps, separate questions? As it will hopefully be clearer as I proceed, by seeing the struggles for rights as *practices of justification*, i.e. asking for justification, denying bad justifications, asking to be part of the justification process, etc., I aim to combine the two questions. From the perspective of participants in the rights-struggles, the instance of making right-claims and its justification are not separate questions, although they can be separated from the perspective of the theorist. I aim to perceive these two questions as one (two-tiered) question, first from the perspective of participants in rights-struggles as to what it means to have, claim or ask for rights and second from the theoretical perspective of whether these claims are justified.

literature on human rights. A standard classification in the human rights literature is to make a distinction between the *naturalistic* and *political* conceptions of human rights. Adherents of the naturalistic conception take the philosophical task to be providing an account of the *nature, justification* and *content* of human rights as part of the best available moral theory. Within the naturalistic approach the question of ‘whether there is a right to X’ is a question to be answered in theory by finding the right principles or ‘existence conditions’¹² of that right and thereby providing a theoretical justification of human rights norms. On the other hand, defenders of the political conception claim that this dominant perception of the philosophical task as one of providing a justification of human rights norms is irrelevant to, or even distorts, international human rights *practice*. However by the *practice* of human rights, these theorists mostly refer to the place of human rights within international law and doctrine rather than the practice of people involved in rights struggles.

This dissertation is an attempt to explore the possibility of an alternative to these two dominant ways of understanding human rights. So, the second main question of this dissertation is: can questions about the nature, content and justification of human rights be taken in a different philosophical manner than the two dominant positions such that it better illuminates real-life struggles? And what difference does it make if we do so? My criterion of ‘better’ is accounting for the *social struggle* aspect of human rights, and in order to make the struggle aspect more specific I test different conceptions against the aforementioned cases, namely the struggles around housing and labor rights. By ‘the social struggle aspect of human rights’ I refer to the invocation of the idea of human rights in social struggles as instruments or ‘weapons’ used for resisting forms of oppression and/or exploitation. I do not deny that one can have a conception of human rights tailored for serving purposes other than accounting for the struggle aspect of human rights. One can argue that the naturalistic and political conceptions have different purposes such as accounting for the moral essence of human rights and the international role of human rights respectively. The claim I will defend in this thesis is that if one has as one’s main purpose to account for the social role of human rights and their invocation within emancipatory struggles, then political and naturalistic conceptions are not well suited to the task. I claim that a democratic account of human rights which grounds human rights on the right to justification interpreted as one that entails a *right to resistance*, instead, can account for this social role of human rights.

¹² For a more detailed discussion of ‘existence conditions’ of human rights, see chapter 2.

2 In defense of a *democratic* account of human rights

Before setting out my way of addressing these questions in the present dissertation, let me sketch, by way of introduction, two dominant philosophical conceptions of human rights: the naturalistic conception and the political conception. These are two broad strategies of understanding the role of philosophy with respect to the idea of human rights, that is, to provide an account of the nature, content and justification of human rights. According to the naturalistic perspective, human rights are perceived as pre-institutional claims that all individuals have against all other individuals in virtue of being human. This view emphasizes the *moral* aspect of human rights in the sense that human rights are (a subset of) moral rights articulating particularly weighty moral concerns, especially valuable goods or interests that all human beings have. Human rights are *derived* from some basic features and interests of human beings which are intrinsically valuable and essential although these essential features and interests that *ground* human rights differ among different naturalistic theories. This way of perceiving human rights as ‘rights people have in virtue of being a human’ is a well-trodden path; the idea of natural rights has a long history and this line of thinking is the dominant one in contemporary political philosophy concerned with human rights (taken for instance by contemporary political philosophers such as Alan Gewirth, James Griffin and John Tasioulas as I show in chapter 2).

The purportedly alternative political conception of human rights, on the other hand, takes the nature of human rights to be claims that individuals have against certain *institutional* structures, in particular, modern states. The political conception stresses the *political-legal* aspect of human rights and it starts from the role human rights play in international doctrine and practice. The paradigmatic case of a political conception is John Rawls’s account of human rights and most versions of the political view adopt Rawls’s formulation of the main role human rights play in international legal and political practice (for instance the accounts of human rights provided by Charles Beitz, Joseph Raz and Thomas Pogge which I will discuss in chapter 3). Although the emphasis shifts from the ‘essentially human’ to the ‘practice’ in the political approach, it is the standards of legitimate sovereignty in the international arena and law which is predominantly perceived as the relevant practice. However, the focus on the role of human rights as that of setting limits to sovereignty and standards for legitimate intervention misses the *intranational* purpose of human rights, namely their role in setting standards of internal political legitimacy. From the perspective of the participants in the rights struggles I started with, the primary perspective of human rights is from *inside*; human rights

provide *reasons* for demanding the power to be involved in the arrangement of the social and political contexts in which they are embedded.

In this dissertation, my *primary aim* is to articulate an alternative theoretical framework that expresses what it means when people in rights struggles claim that they have a right to X. I propose that instead of asking first ‘what is essentially needed for a humane life?’ or ‘which basic features of being human justify a rights claim?’, we take a step back and shift our attention to the question what these people in rights struggles *do* when claiming that they have such-and-such rights? I start from the observation that a rights claim is deployed and contested in political practice. Then I develop an approach that aims at making sense of that practice; what is the meaning of a rights claim? What do people *do* when claiming that right? I call this approach a *democratic* approach to human rights.¹³

In my view my starting from the practice is similar to approaches defended by scholars like James Tully and Donald Comstock. Similar to their approaches, I also endorse a view, which starts from and grants a certain primacy to practice.¹⁴ One of the characteristics of this ‘practical’ or ‘critical’ approach as Tully calls it, is that it is “a form of philosophical reflection on practices of governance in the present that are experienced as oppressive in some way and are called into question by those subject to them.”¹⁵ Similarly, Comstock argues that critical social research begins with practical problems of everyday existence; life problems of definite and particular social agents who may be individuals, groups or classes that are oppressed by or alienated from social processes.¹⁶ In line with what can also be called a bottom-up approach I start with the contemporary (political) practice of rights. I start with what I call everyday rights struggles—the political contestations, struggles, conflicts and consensus over the notion of rights in everyday life. The vulnerable people involved in the conflicts mentioned above argue that they have rights in virtue of their humanity and claim that the policies that are supposed to be implemented violate those rights. These struggles are

¹³ I label this conception of human rights *democratic* to emphasize its understanding of an internal connection between democracy and human rights (section 6.2) and the political role of human rights as part of democratic politics (section 6.4).

¹⁴ The so-called ‘political’ or ‘practical’ conception of human rights also claims to start from practice. Yet, as I will examine in detail in chapter 3, by the term ‘practice’, the main theories within the political conception of human rights refer to the doctrine of human rights law and the role of human rights within interstate or international relations. The approach I am defending also starts from ‘practice’ but one which is not contextualized in predominantly legal terms and which is not reduced to a matter of international law and international relations.

¹⁵ James Tully, “Political Philosophy as a Critical Activity,” *Political Theory* 30, no. 4 (2002): 534.

¹⁶ Donald E. Comstock, “A Method for Critical Research,” in *Readings in the Philosophy of Science*, ed. Michael Martin and Lee C. McIntyre (Cambridge, Mass.: MITPress., 1994), 378.

for me examples of contemporary uses of rights in real-life problems; therefore I start with them.

For the purpose of developing a theoretical framework that is sensitive to the practice of rights struggles, I rely on the discourse-theoretic conceptions of human rights and specifically the version proposed by Rainer Forst.¹⁷ Forst puts forward what he calls a ‘constructivist’ conception of human rights which is different from naturalistic and political conceptions of human rights with respect to the normative grounds and justification of human rights. He provides a reflexive argument for the justification of human rights based on what he calls ‘*the right to justification*’. I offer an interpretation of the right to justification as one that entails a *right to resistance*. I do not claim that the right to resistance is the grounding or fundamental right. Rather, I offer an interpretation of the right to justification such that within everyday rights struggles the right to justification is instantiated as a right to resistance; as a *negation* of bad (or no) justifications given for a policy, law or institution by the groups of people who are subjected to them and who claim to be oppressed or unjustly treated by them. Since the right to resistance is not the foundational right or the basis from which all other rights derive, I do not offer my account as a different ‘conception’ of human rights but as an ‘account’ of the discourse-theoretic conception of human rights. More precisely, the democratic account of human rights that I develop in this dissertation is a further elaboration of Rainer Forst’s account of human rights, whereby I incorporate insights from real-life rights struggles. This account of human rights, I will argue, captures the political and social meaning of human rights from the perspective of the participants in the rights struggles. The right to justification is a right to ‘count’ socially and politically, to be *authors* as well as subjects of rights; it is a right to the power to co-determine the conditions of social and political life. Moreover, this interpretation of the right to justification as one that entails a right to resistance gives not only a central place to consensus and agreement but also gives room for dissent and conflict in thinking about both human rights and democracy. As such, the democratic account could avoid at least some of the criticism that strikes discourse-theoretic conceptions (i.e. (rational) consensus-centrism) as well as naturalistic and political conceptions.

My argumentative strategy of comparing the democratic account to the naturalistic, political and discourse-theoretic conceptions of human rights does not aim to refute any of

¹⁷ Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. Jeffrey Flynn (New York: Columbia University Press, 2012); Rainer Forst, “The Basic Right to Justification: Towards a Constructivist Conception of Human Rights,” *Constellations* 6, no. 1 (1999): 35–60; Rainer Forst, “The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,” *Ethics* 120, no. 4 (2010): 711–740.

them or show that the democratic account is philosophically superior to them. Instead, I aim to show where these different approaches draw our attention in their analysis of human rights; the naturalistic conception emphasizes morally relevant human features and interests that substantiate rights claims whereas the political conception emphasizes the role of human rights within international law and practice. Although the discourse-theoretic conception of human rights fares better than the naturalistic and political conceptions of human rights on some grounds (such as accounting for the internal connection between human rights and democracy, perceiving the political dimension of human rights, etc.), it still faces some difficulties such as being consensus-centric. The democratic account, as I will argue, can answer some of these problems and it provides a perspective that is in tune with that of the participants in rights struggles. Therefore, for the purpose of explaining what participants in the social struggles *do* when they claim a right, a democratic account of human rights fares better than naturalistic or political conceptions as well as incorporating an element of dissent into discourse-theoretic approaches. This is what I will argue in this dissertation.

3 Outline

The thesis is organized into six chapters. In chapter 1, I set the stage for a philosophical investigation of contemporary human rights practice. I focus on two human rights: the right to housing and the right to work. I sketch two instances of contemporary rights struggles for these rights in the context of two recent cases from Turkey (struggles of tobacco workers and slum residents in Dikmen Valley, Ankara). My primary aim in this chapter is to illustrate what I call real-life rights struggles (political conflicts and contestations during which claims against the political and social order are made in the currency of rights) rather than giving a detailed description and analysis of these cases. In the context of the cases, I make preliminary theoretical considerations focusing on three points: the framing of the demands by the parties in these conflicts and movements in terms of (human) rights; the justification of a right in the political practice; the *collective* struggle aspect of demands for socio-economic rights.

In chapters 2 and 3, I critically discuss two approaches that are perceived to be dominant in the mainstream Anglo-American philosophy of human rights: the naturalistic conception and the political conception respectively. I examine the general characteristics and some prominent versions of the naturalistic and political conceptions of human rights such as those provided by James Griffin, John Tasioulas, Joseph Raz, Charles Beitz and Thomas Pogge. I also examine the implications of each conception's general perspective on human rights for an

evaluation of the claims that there is a human right to work and a human right to adequate housing. Within the naturalistic approach the question of ‘whether there is a right to X’ is a question to be answered in theory by finding the right principles as part of the best available moral theory and thereby providing a theoretical justification of human rights norms. Yet defenders of the political conception claim that this dominant interpretation of the philosophical task as one of providing a justification of human rights norms is irrelevant to, or even distorts, contemporary human rights practice. However, by ‘the practice of human rights’ these theorists mostly refer to the place of human rights within international law and legal doctrine rather than the practice of people involved in rights struggles.

This dissertation is informed by the goal of opening up a new philosophical perspective that gives a moral justification of human rights and that at the same time accounts for the social struggle aspect of human rights. For this aim, I propose a modification of the discourse-theoretic conceptions of human rights. By perceiving human rights and democracy to be internally connected, discourse-theoretic accounts perceive human rights to be the outcome of political struggle; people are *authors* as well as subjects of rights. In order to substantiate my modification of the discourse-theoretic conception of human rights, I provide in chapter 4 a discussion of the basic influences of Jürgen Habermas’s work on human rights including his 1) rational reconstruction of the system of rights within constitutional democracies, 2) analysis of the dual nature of human rights in relation to law and morality. This discussion is followed by an examination of two recent discourse-theoretic accounts of human rights pursued by Seyla Benhabib and Rainer Forst.

Chapter 5 steps back from the discussion of specific conceptions of human rights and focuses on the skepticism raised against the idea of human rights in general and socio-economic rights in particular. These objections attack the core assumptions of a theory of human rights such as that rights principles are abstract, individualist, ethnocentric, bourgeois. Although there is some truth to such objections, I argue that it is a mistake to take a general and unequivocally critical position on human rights. Moreover, I claim that a discourse-theoretic conception of human rights could avoid at least some of the criticism that strikes at naturalistic and political conceptions of human rights.

Although the discourse-theoretic conception of human rights fares better than the naturalistic and political conceptions of human rights in terms of accounting for the interdependence of human rights and democracy, it still faces some difficulties. One problem especially in Habermas’s account of human rights is the absence of a moral justification of human rights. In chapter 6, I propose a revised version of a discourse-theoretic conception

which I call a democratic account that a) accounts for the internal connection between democracy and human rights and b) grounds human rights on a particular interpretation of Rainer Forst's basic 'right to justification', namely interpreted as a right to resistance. Habermas's discourse principle is mainly a principle of consent; it emphasizes the consent of those affected to the norms and actions. Forst's principle of justification incorporates dissent, since the right to justification accords to each moral person a *veto right* against basic norms, arrangements, or structures that cannot be justified reciprocally and generally to him or her. I argue that the right to justification, in non-ideal circumstances, entails a right to resistance: a right to denounce unjust structures and orders one is subjected to. A conception of human rights based on the right to justification understood as entailing a *right to resistance* gives not only to consensus and agreement but also to dissent and conflict a central place in thinking about both human rights and democracy.

In chapter 7, I conclude by bringing the theoretical framework developed in the previous chapters to bear on the question of how a rights claim is raised and justified in political practice, and I show that the democratic account shifts the aim of philosophy in thinking about human rights. The democratic account shows that it is possible to theorize and justify human rights without first identifying the specific human features and needs that substantiate human rights— as a matter of normative theorizing without making reference to practice. It also shows that it is possible to go beyond the political conception's perception of practice as a matter of international relations and law as it directs our attention to the role of human rights in determining internal political legitimacy. The theoretical framework developed in this dissertation thereby shows that it is possible, in our philosophical thinking, to take a perspective that is in tune with the experience of the participants in social struggles for rights without losing the moral authority of human rights.

1 Setting up an Inquiry: Contemporary Rights Struggles

1.1 Introduction

In this chapter, I will set the stage for a philosophical investigation of contemporary human rights practice. I will focus on two human rights: the right to housing and the right to work. After giving a brief sketch of contemporary struggles around those rights, with specific reference to two cases in Turkey,¹⁸ I will outline some broad questions which will frame the analysis undertaken in this dissertation. My primary aim in this chapter is not to give a detailed description and analysis of these cases. Instead, I have the aim of making some preliminary theoretical considerations about these cases focusing on three points: the framing of the resistance movements as a rights struggle, the justification of a rights claim in political practice and the relation between rights struggles and the socio-economic structure.

Both the right to housing and the right to work are recognized as human rights in some of the most important treaties and conventions. ‘Adequate housing’ was recognized as a human right in 1948, upon the adoption of the Universal Declaration of Human Rights (Article 25.1).¹⁹ Similarly, Article 23.1 of the Universal Declaration of Human Rights states: “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”²⁰ In the human rights discourse and literature, these rights are classified under what is called social and economic rights, also called ‘second generation rights’, and distinguished from civil and political rights (first

¹⁸ There is also a logistic preference for choosing the cases from Turkey. Because I have Turkish citizenship and visit Ankara frequently, I am more familiar with those cases. Therefore I had the chance to observe and participate in the struggles. Although this dissertation does not have a central sociological or anthropological research aim, I visited the valley and have done three extensive interviews with participants in the right to housing movement during Summer 2012. First, in January 2012, I talked to one scholar who has written about the theoretical considerations for rights struggles (Prof. Dr. Metin Özügürü). He introduced me to the people in the neighborhood and also to the scholarly work (in Turkish) on rights struggles he co-edited, see Yalçın Bükev et al., eds., *Kuramsal ve Tarihsel Boyutlarıyla Hak Mücadeleleri [Rights Struggles: Theoretical and Historical Dimensions]*, Two Vols. (Ankara: Notabene Yayınları, 2011). Afterwards, in July 2012, I talked to two participants and members of the executive board of the civil organization called Halkevleri (literal translation is ‘People’s Houses’ also translatable as ‘Community Centers’) which is active in the right to housing movement (Mahir Mansuroğlu and Candaş Türkyılmaz on 22 July 2012), one resident of the valley who is also seen as the leader of the resistance (Tarık Çalışkan on 26 July 2012), one lawyer for the residents (Ender Büyükçulha on 24 July 2012). In the case of TEKEL workers’ resistance, as the resistance was over when I started my research, I relied on secondary resources.

¹⁹ The full article states: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

²⁰ Here I use the terms right to work and rights of workers (e.g. trade union rights, labour rights, individual labour protections) interchangeably meaning that a right to work means a right to non-coerced work with just working conditions such as rights to join and act within trade unions, security protections and limits to working hours.

generation) and cultural rights (third generation rights). Nowadays, most people and philosophers consider socio-economic rights as genuine human rights but there is still philosophical controversy about the nature, justification and content of those rights. Some people argue that socio-economic rights are not genuine human rights because human rights are in essence negative rights.²¹ Others argue that every valid right must be associated with an obligation on the part of some identifiable agent, and in the case of economic rights the duty bearers are not clearly identified.²² Throughout this dissertation, I will explore different philosophical approaches to the nature, justification and content of human rights in general and socio-economic rights in particular. Let me first give some background information about the cases.

1.2 Two cases of contemporary rights struggles

1.2.1 Urban redevelopment and the right to housing

In the 1980s large-scale urban transformation projects were launched in Ankara. ‘The Dikmen Valley Housing and Environmental Development Project’ was one of the pioneer interventions of this type situated in Dikmen Valley aiming at redeveloping an unauthorized housing area. Dikmen Valley is one of the riverbeds in Ankara and covers 290 hectares. As part of this project, the people residing in the squatter (*gecekondu*²³ in Turkish) neighborhood have been asked to leave their houses as the transformation project required demolishing the buildings in the area. These are mostly people who had migrated to Ankara in the 1970s from various parts of Turkey and they constructed the slums in the 1980s. They have been told that they will be given houses from the new buildings constructed. Declaring that the conditions offered in order to afford another house are unacceptable and that the residents of squatter houses who have already accepted the conditions did not get adequate housing, 600

²¹ See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); Maurice William Cranston, *What Are Human Rights?* (London: Bodley Head, 1973).

²² See, e.g., Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996), chap. 5. Onora O’Neill, *Bounds of Justice* (Cambridge, Mass.: Cambridge University Press, 2000).

²³ The slum houses are called *gecekondu* in Turkish which means ‘built overnight’ referring to the fact that they are built without official permission and in a short time by the resident’s own means. People who came to the big cities in internal migrations in the 1970s provided the labor supply required and because there were not many social housing opportunities they built their own slum/squatter houses. The state provided ownership rights to some of these residents over time. In this dissertation I will use the term ‘squatter house’ to refer to *gecekondu* and the term ‘slum’ to refer to the neighborhood comprised of many *gecekondu*.

households started to resist the demolition in 2006 (there were about 2,400 households at the beginning of the project).²⁴ They describe their struggle in these words:

We are people of Dikmen Valley. You should know us well by now. We are poor, we are workers. We are working and earning our life by our labour. Most men among us work as waiters, construction workers, janitors...Most women among us work as cleaning workers in their or other people's houses, they are houseworkers...our children, our youth...We don't want to have a villa or palace. What we want is just a house to live in and to live a humane life. For this we struggled for six years with our honour, we claimed our houses, our district, our city. . . . We realized that the state which has forgotten us in our poor district and did not provide water, electricity, public transportation, playgrounds, sport fields, health care and schooling services, eventually remembered us. But, we witnessed that the state provided cruelty and demolition to us, to its citizens. Because, these lands on which we built our houses and raised our children and lived with our honour are now wanted to be given as a present to capital under the name of "urban transformation plan". In order to build and sell luxurious houses in which a handful of wealthy people live, in order to fill the pockets and safes of some people, our squatter houses (gecekondu) need to be demolished. . . . We don't want much, we just want that our right to housing is recognized and that our right to a house in order to have a human life is respected.²⁵

²⁴ Although the urban transformation project including the Dikmen Valley region started much earlier in the 1990s due to the proximity of the region to the city center, it was accelerated after the local elections in 2004 and the City Council Meeting dated 17 February 2006 where 'Dikmen Valley 3th, 4th and 5th Stage Urban transformation Project Principles' were determined and decided unilaterally by the municipal authorities without informing the residents or asking them to participate. As the implementation process of the transformation project was not uniform in these years, the resistance of the residents has also been multifaceted. At the initial stage, the majority of the residents accepted the conditions and left their houses, the remaining residents unified among themselves and co-operated with NGOs, and received some public support. During 2007-2008, the pressures of the authorities on the residents intensified as some public utilities such as electricity, mail, transport which has been provided by other public and private institutions were restricted for the residents of the Dikmen Valley. In 2010, 'Law on Amendments to the Municipal Acts' (Law no. 5998) which reforms and extends the power of municipalities in implementing urban renewal projects (in particular for the goal and scope of implementation) was passed by the Council of Ministers. One month after this law was put into force, the Council of Ministers subsequently decided on the implementation of new urban renewal and development projects in Dikmen Valley (Decision no: 2010/667, date 13.07.2010). Consequently, in July 2011, a new ministry; 'The Ministry of Environment and Urbanization' with the Decree No. 644 is established. Perhaps considering the persistent resistance from residents against the earlier project, this time a negotiation and debate process with the residents is initiated. However, this did not last long (see footnote 27 for more detail). The most recent piece of important information about the current situation of the Dikmen Valley region is that on 13.11.2014, the Municipality of Ankara announced in the *Official Gazette of the Republic of Turkey No. 29174* (the national and only official journal of the country that publishes the new legislation and other official announcements) that nine parcels of immovable property (which refers to the region within 4th and 5th stage urban transformation project in Dikmen Valley) will be sold through a closed auction. The auction took place on 27.11.2014 accompanied by the protests of the Dikmen Valley residents and because no decision could be reached at the first auction it was postponed to 11.12.2014. The sale could not be finalized in the second auction as well (only two firms participated in the auction and neither of them could make an offer to buy all nine parcels together as the municipality demanded). The auction was postponed again.

²⁵ The online news and petition (dated November 14, 2011) signed by the organizations and people who declare solidarity with the residents of Dikmen Valley in their resistance to the demolition. The translation from Turkish to English is done by me. The text is available at http://www.sendika.org/yazi.php?yazi_no=40911 (Accessed on October 12, 2012). For a wider and in-depth coverage of the story of the resistance of Dikmen Valley residents see <http://oradahayatvar.net/> (Accessed on January 26, 2014). The information and documents at this website are in Turkish but there is a gallery of photographs of the district documented over time by the documentary photography project. For more information about the Dikmen Valley case in English, see Begüm Aykan, *Frame Alignment Strategies in the Right to Sheltering Movement: The Case of Dikmen Valley*, Unpublished Master Thesis (Ankara, 2011). Available at <http://etd.lib.metu.edu.tr/upload/12613448/index.pdf> (visited on January 26, 2014).

Since 2006, the residents of Dikmen Valley have continued an organized struggle which they call ‘a housing rights struggle’.²⁶ They have established an office of housing rights in the neighborhood. They have developed a collaboration with the chambers of architecture and urban planning and another bureau of housing rights in another district of Ankara. They formed an urban transformation and Right to Housing work-group in 2006. The work-group organized one Right to Housing Forum in 2009 and participated in the organization of one People’s Rights Forum in 2011 in Ankara with the participation of environmental engineers, urban planners, architects, the representatives of Dikmen valley neighborhood as well as some other people opposing urban transformation projects in one other district in Ankara (Mamak) and 8 districts in Istanbul. After the first forum, they formed an office (literal translation is ‘assembly for the right to housing’) which is the center of the resistance against the demolition as well as a forum for having meetings to discuss the problems of the inhabitants of the neighborhood or to have cultural activities. Since the beginning of the conflict, there have been several occasions on which police officers came to the district to start demolishing the squatter houses. They had grim fights with the police officers and many law-suits have been opened by the residents of the district; both individual cases (personal action) as well as collective cases (public action) are still ongoing.²⁷ The central demand in their struggle, as is stated in the call for petition, is that they want their right to housing to be recognized and that their right to a house in order to live a human life is respected.²⁸

²⁶ The phrase *barınma hakkı* (in Turkish) can be translated as ‘the right to housing’ or alternatively as ‘the right to shelter’, I prefer to use the term ‘right to housing’ in order to refer to the main demand of this movement, but the term meant to demand more than a ‘roof’ but rather adequate conditions of housing echoing the terminology of ‘right to adequate housing’ or ‘right to a standard of living’ in human rights discourse.

²⁷ Due to their long-lasting resistance to the demolition of their houses, in 2011 a dialog and negotiation process between the residents of the valley and the municipal authorities has been initiated. The residents met the mayor of Ankara (İ.Melih Gökçek) and municipality bureaucrats on 6 January 2012. The representatives of the residents demand that the instalments to buy from the newly built houses are adjusted to the socio-economic conditions of the residents and the process of debate and discussion of the policies with the residents is continued. However, the mayor declines these demands and suggestions. In addition, when a woman was explaining that she cannot meet the payment conditions demanded by the authorities because her husband is unemployed and she cannot work because her newborn kid is sick, the mayor replied, in a scornful manner, suggesting that the husband can sell lemons. As the tension in the meeting invoked by this comment increased, the mayor left the meeting. After this incident, the debate and discussion process among the residents and municipal authorities stopped and the demolition attempts accelerated (three demolition attempts took place in January 2012). By the time I completed this thesis (End of January 2015), some residents of slum houses are still resisting the demolition although their number decreased due to increased pressure from the authorities. In response to the most recent change in policy of the municipality to sell the parcels which include the houses of those residents, they have protested that the auction is illegitimate. In addition, the Union of Chambers of Turkish Engineers and Architects (TMMOB) which opened a law-suit for the termination of the urban transformation project declared that they will open a lawsuit demanding the cancellation of the opening of the parcels that include the residential areas on sale at auction. The resistance is ongoing and it is uncertain how it will culminate in the near future. However, what is certain is that the resistance having gone on for more than seven years now has turned to a symbol of ‘the right to housing struggles’ in Turkey.

²⁸ See footnote 20 above for the reference.

Is the struggle of the people of Dikmen Valley unique? In some senses it is unique and in other senses it is not. With respect to the peculiar process of urbanization, its legal structure and the relation between the state, local authorities and the private sector concerning urban transformation projects in Turkey, the resistance of Dikmen Valley residents has its idiosyncrasies. On the other hand, in the sense that the residents of Dikmen Valley are evicted from the places they live, it is not unique as in many countries of the world, many people face the threat of being evicted from the places they live due to various reasons such as urban transformation projects, construction of dams, roads, hydroelectric power stations, etc. As is documented in the United Nations Human Settlements Programme (UN-Habitat) Report (2011), evictions and housing rights violations have increased globally.²⁹ What is especially important about the case of Dikmen Valley resistance for the purposes of this dissertation is that it is explicitly organized around the claim and slogan of ‘people have the right to housing’, and they pursue what they call a rights struggle against neoliberal policies of urban planning.

The expansion of neoliberal forms of planning has fueled a discussion around the notion of ‘the right to the city’ in human geography and urban sociology, especially in critical urban theory.³⁰ Critical urban theorists stress that political and economic restructuring in cities is negatively affecting the enfranchisement of urban residents. The idea of the right to the city has been explored and popularized as a response to this perceived disenfranchisement in cities and as a way to empower urban dwellers.³¹ In this approach the right to adequate housing is seen as one of the central rights among a group of rights associated with urban life such as the right to education, the right to health care and the right to transportation.

David Harvey, one of the prominent thinkers of the right to the city, states that the right to the city is one of the most important human rights. Yet in practice the right to the city seems a far cry from reality; as we suspect, it seems a far cry from the universality of the UN

²⁹ “*Evictions and the rights-based approach to urban development*”, UN-Habitat Publications September 2011. Available at <http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=3359> (Accessed on October 13, 2012). Although there is no information and data about the exact time span and rate of increase in the instances of forced evictions in this document, the Executive Summary Report of the UN-Habitat Advisory Group on Forced Evictions (AGFE) of April 2007 makes the estimation that at the current pace, at least 38 and possibly 70 million people will have been evicted between 2000 and 2020.” Available at <http://www.hic-net.org/articles.php?pid=2145> (Accessed on January 27, 2014).

³⁰ The term ‘neo-liberal’ is a difficult term as it has many different definitions and usages in the literature but this ambiguity about the term does not necessarily affect my argument here. With respect to urban policies I follow Guy Beaten’s definition of neoliberal forms of planning as “the reworking of actors, policies, institutions and regulatory frameworks in order to facilitate market-driven land use.” Guy Baeten, “Neoliberal Planning: Does It Really Exist?,” in *Contradictions of Neoliberal Planning*, ed. Tuna Tasan-Kok and Guy Baeten (Berlin: Springer, 2011), 206.

³¹ Mark Purcell, “Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant,” *GeoJournal* 58, no. 2–3 (2002): 99.

Declaration of Human Rights. The endless accumulation of capital and the conception of rights embedded in it, Harvey argues, produce inequality and injustice. In the era of global capitalism the inalienable rights of private property and profit rule. However, Harvey argues that at the face of “force deciding between equal rights” we cannot cynically dismiss utopian thinking and ideals of justice.³² Instead, we should contextualize them; we should fight for the turning upside down of rights, to make the now derivative rights more fundamental. “The inalienable right to the city”, as a more inclusive city with a public sphere of active democratic participation, Harvey says, “is worth fighting for.”³³

Like Harvey, Peter Marcuse also argues that there is a conflict in rights. He formulates the right to the city as “an exigent demand by those deprived of basic material and existing legal rights”, a demand raised by those who are deprived and alienated.³⁴ He also argues “that there is a conflict among rights that needs to be faced and resolved rather than wished away.”³⁵ As I will argue, the critical approach to human rights perceives a dialectical relationship between rights and the *subject* of rights in the sense that rights are a matter of political struggle and contestation among various agents. Therefore, even if one argues that as a moral idea a universal human right belongs to *all* human beings ideally, in concrete situations it is not practiced and exercised by all equally; there are ongoing contestations and struggles over rights. It can also be the case that both sides of a debate make an appeal to rights, but to different rights. For instance the defenders of abortion (identified as pro-choice) argue that women have the right to decide about matters concerning their bodies including reproduction, whereas opponents of abortion (identified as pro-life) argue that the fetus has a right to life. Or it can be the case that different groups of people have a conflict of interests over the exercise of the self-same right, for instance how the resources of a nation will be used collectively (etc. land rights, housing rights, rights over natural resources like rivers, forests, etc.) can be seen as a conflict over the distribution of resources within society as well as a conflict over property rights of different individuals. In this sense, the right to the housing claims of the urban poor can be seen as a demand for their property rights in conflict with the property rights of the construction companies.

³² The phrase “force deciding between equal rights” refers to Karl Marx’s famous observation “between equal rights force decides” where he refers to the struggles over the determination of the working day during the industrial revolution. Karl Marx, *Capital: Volume 1: A Critique of Political Economy*, (London: Penguin Books, 1999), 344. At first sight, this quote appears cynical suggesting that there is only power politics echoing Marx’s famous critique of the notions of rights and justice to which I will return in more detail in chapter five.

³³ David Harvey, “The Right to the City,” *International Journal of Urban and Regional Research* 27, no. 4 (2003): 939–41.

³⁴ Peter Marcuse, “From Critical Urban Theory to the Right to the City,” *City* 13, no. 2–3 (2009): 190.

³⁵ *Ibid.*, 191.

The right to the city literature in critical urban theory demonstrates how the strategy of contextualizing universal human rights language can mobilize urban politics. I think this literature can be informative for moral and political philosophy in its depiction of how the claim of the right to the city, “a moral claim, founded on fundamental principles of justice, of ethics, of morality, of virtue, of the good”, is contextualized in practice and is expressed in terms of a struggle for rights.³⁶

1.2.2 The right to work

Now I want to shift to another struggle, again in the city of Ankara. In 2008, TEKEL (a former state-owned enterprise of tobacco and alcoholic beverages) was sold to British-American Tobacco (BAT).³⁷ It was part of a series of privatization projects, steps of which have already been taken by previous governments. In 9 December 1999, a letter of intent was made conditional by the International Monetary Fund (IMF) that involved directives to dismantle the public support and subsidization schemes for the agricultural economy in general, and privatization of the tobacco, spirits, animal husbandry and sugar plants, in particular.³⁸

The new owners sacked more than eight thousand workers and in December 2009 they announced that they were going to close down twelve factories and twelve thousand workers would be displaced. The government proposed a new contract for workers which is known by its identifying code: the 4-C. According to the Privatization Law of Public Enterprises, employees of a privatized public enterprise have a right to be employed with the same personal benefits (in other words, keeping their acquired labor rights) in other public enterprises. However, the AKP government added a temporary clause to this law in 2004. The proposed 4-C contract relied on this added clause and it was formulated by the government as an interim solution for displaced workers. The contract involved re-defining the job status of the workers as temporary (up to ten months), with no guarantee of renewal. For the TEKEL workers this shift in their job status would have meant that their average monthly wage would

³⁶ Marcuse, “From Critical Urban Theory to the Right to the City.”

³⁷ “BAT buys Turkish cigarette firm.” *BBC News*. February 22, 2008. Available at <http://news.bbc.co.uk/2/hi/business/7259336.stm> (Accessed on January 24, 2014). The current AKP government in Turkey sold the TEKEL alcohol and spirits plants to a national consortium (MEY) for \$ 292 million in November 2003 and the new owners in turn re-sold the alcohol and spirit components of TEKEL to *Texas Pacific Group* in 2006 for a total of \$ 900 million. And in 2008 the tobacco and cigarette production section of the company (with the naming rights of TEKEL) was sold to British-American-Tobacco for \$1.72 billion. For more information in English see Erinc Yeldan, “TEKEL Workers’ Resistance: Re-awakening of the Proletariat in Turkey”, January 30, 2010. Available at <http://www.sendika.org/2010/01/tekel-workers-resistance-re-awakening-of-the-proletariat-in-turkey-erinc-yeldan/> (visited on January 21 2014).

³⁸ Yeldan, “TEKEL Workers’ Resistance.”

decrease from TL1,200 (approx. \$800) to TL800 (approx. \$550).³⁹ In addition, “the new ‘jobs’ would not necessarily be related to the displaced workers’ ability or expertise, and in practice they have taken various forms of simple public services such as gardening public parks, etc.”⁴⁰ The workers were given one month’s time to decide if they would accept the 4-C contract.

Declaring that these conditions are unacceptable, on December 15, 2009 an estimated twelve thousands workers from factories across the country marched to Ankara and set up a camp of resistance in one of the central squares in the city center. They have, taking turns, stayed in their makeshift tents for 78 days despite freezing cold, police forces’ heavy-handed action and government opposition. The TEKEL workers’ resistance received massive support from citizens all over Turkey, university students, workers from other unions and from national and international bodies including the European Parliament and the International Trade Union Confederation (ITUC). It is recognized as one of the most powerful workers’ struggle of recent years in Turkey and Europe. On 4 February 2010 tens of thousands of Turkish workers took part in a one day general strike organized by Türk-İş union in support of the protest.⁴¹ TEKEL workers also opened a lawsuit against the government’s imposition of one month’s time to shift to 4-C status. On March 1, 2010 the Court of State Council (Danıştay) decided in favor of the workers that the execution of the decision that changes the TEKEL workers’ contract to 4-C status is suspended. After this decision the workers removed their tents and their struggle entered into another phase.

As the scholar Metin Özuğurlu argues; “the leitmotiv of the fight between the TEKEL resisters and the government was directly constituted by the concept of rights.”⁴² The workers put their demands into the framework of a rights’ struggle. They did not make their gained labor rights a matter of negotiation and accept the precarious employment conditions (without job security and with cuts in wages and social benefits). Therefore, for the workers, their rights are their conditions within the struggle. They stated that they could sit at the negotiating

³⁹ Metin Özuğurlu, “The TEKEL Resistance Movement: Reminiscences on Class Struggle,” *Capital & Class* 35, no. 2 (2011): 180.

⁴⁰ Yeldan, “TEKEL Workers’ Resistance.”

⁴¹ Note that general strikes are outlawed in Turkey and there is no established tradition of this kind of action in the labor history of the country. However, the workers starting from the first days of the resistance raised a strong demand for a general strike and this demand brought them against the Türk-İş union bureaucracy as they first tried to bring the general strike demand of the workers down. Bearing this in mind, a general strike is a more explosive event in the Turkish context than in many other countries. For this reason, the TEKEL’s workers resistance has been already considered as a remarkable episode in the history of the labor movement in Turkey. Cf. Yeldan, “Tekel Workers’ Resistance”; Sungur Savran, “Turkey: The Working-Class (literally) Takes the Stage,” *The Bullet Socialist Project E-Bulletin*, no. 299 (2010), Available at <http://www.socialistproject.ca/bullet/299.php> (Accessed on January 21, 2014).

⁴² Özuğurlu, “The TEKEL Resistance Movement,” 183.

table for instance for negotiating over wage levels only after their rights and conditions are accepted.⁴³

Without doubt, the concept of a human right is a powerful concept and most social movements appealed to it for public agitation or to gain public support for their causes. Indeed, Prime Minister Erdoğan tried to downplay the power of the rights' talk during the initial stages of the resistance. Erdoğan himself said: "this [TEKEL worker's resistance] is no longer a struggle to achieve rights" and posited himself as the defender of "orphan's rights against the TEKEL resisters."⁴⁴

The notions of rights and human rights have been employed to a large extent in labor movements historically and recently the human rights terminology of the right to a decent job in order to have a decent and dignified human life have been frequently used in the struggle for labor's rights.⁴⁵ While labor rights movements and human rights movements have both long used rights principles and language to advocate their goals, they also had different trajectories. As Virginia Leary observes in an influential essay published in 1996:

Worker's rights are human rights, yet the international human rights movement devotes little attention to the rights of workers. At the same time, trade unions and labor leaders rarely enlist the support of human rights groups for defense of worker's rights. A regrettable paradox: the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet.⁴⁶

Leary argues that although the catalogue of international human rights includes numerous rights relating to work and despite the fact that there has been a correlation between the status of worker's rights and the status of human rights in general in a country, non-governmental human rights organizations generally choose to concentrate on political and civil rights issues (such as torture, imprisonment of political prisoners, or free speech issues) and they neglect economic, social and cultural rights (such as the right to housing, the right to food and

⁴³ Ibid., 182–183.

⁴⁴ Quoted in Ibid., 183. The term 'orphan's rights' is rooted in the Islamic faith and refers to an asset that belongs to the entire community the protection of which is the governors' responsibility. Therefore, by referring to orphan's rights Prime Minister Erdoğan was implying that the demands of TEKEL were a burden on the public budget. Ibid., n. 2.

⁴⁵ A right to work is embodied in some legal systems. For example, in India a labor law and social security measure called The National Rural Employment Guarantee Act 2005 was initiated in 2 February 2006 that aims to guarantee 'the right to work'. Its objective is stated as "to ensure livelihood security in rural areas by providing at least 100 days of wage employment in a financial year to every household whose adult members volunteer to do unskilled manual work. Report of the Comptroller and Auditor General of India on Performance Audit of Mahatma Gandhi National Rural Employment Guarantee Scheme (Report no.-6 of 2013-Union Government (Ministry of Rural Development)), vii. Accessed on 7 January 2014 at http://saiindia.gov.in/english/home/Our_Products/Audit_Report/Government_Wise/union_audit/recent_reports/union_performance/2013/Civil/Report_6/Report_6.html.

⁴⁶ Virginia A. Leary, "The Paradox of Worker's Rights as Human Rights," in *Human Rights, Labor Rights, and International Trade*, ed. Lance A. Compa and Stephen F. Diamond (Philadelphia: University of Pennsylvania Press, 1996), 22.

worker's rights).⁴⁷ Labor advocates and labor unions, on their part, relied on their own organizations for promoting and advocating worker's rights, and they were oblivious to the international human rights movement thereby reducing the chances of cooperation with human rights organizations.

This trend of failing to address worker's rights as human rights is perceived to be changing in the late 1990s. Some creative partnerships have evolved between labor unions and key human rights organizations. Labor scholars and labor movements, particularly in the United States, have developed a keen interest in human rights discourse and using international legal instruments for advocating worker's rights. These scholars and activists have argued that "worker's rights are fundamental human rights and ought to be constitutionalized or statutorily recognized as such."⁴⁸ Recently, there has been a call to bring labor rights into the mainstream discussion and practice of human rights which is considered to be an urgent task given the current context of the global economic recession and the increasing unemployment and poverty rates worldwide.⁴⁹ Some defenders of labor's rights, on the other hand, warned about putting too much emphasis on human rights arguing that there are risks that a rights-based approach fosters individualism instead of collective worker power and that it subverts the very idea of union solidarity.⁵⁰ Therefore, a debate about the role and effectiveness of human rights activism and human rights arguments in support of workers' rights has been fueled mainly among labor historians and international lawyers. It is worth exploring what political philosophy can contribute to that debate. An analysis of the notion of labor rights as human rights; the extent to which labor rights *are* human rights and the extent to which they diverge from basic human rights such that they require separate analysis and application can be a good starting point.

⁴⁷ Ibid., 22–24. Some important international human rights documents that include rights relating to work are: The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and especially the conventions adopted by the International Labor Organization (ILO), which preserved the right to association (the right to form and join trade unions), the right to free choice of employment, the right to equal remuneration for work of equal worth (equal pay for equal work), the right to just and favorable conditions of work and the convention which prohibited forced labor and discrimination in employment. Leary made the observation that there was very little cooperation between human rights organizations and that Amnesty International appears to be the only human rights NGO that regularly attends the ILO conference and which has developed a strategy to cooperate with the ILO. Ibid., 24.

⁴⁸ Kevin Kolben, "Labor Rights as Human Rights," *Virginia Journal of International Law* 50, no. 2 (2010): 450. Cf. Lance A. Compa, "Labor's New Opening to International Human Rights Standards," *WorkingUSA: The Journal of Labor and Society* 11, no. 1 (2008): 99–123.

⁴⁹ Shareen Hertel, "Human Rights and the Global Economy: Bringing Labor Rights Back in," *Maryland Journal of International Law* 24, no. 1 (2009): 283–95.

⁵⁰ See, for instance, Nelson Lichtenstein, "The Rights Revolution," *New Labor Forum* (Spring 2003): 60–73; David Brody, "Labor Rights as Human Rights: A Reality Check," *British Journal of Industrial Relations* 39, no. 4 (2001): 601–5.

1.3 Preliminary theoretical considerations about the cases

The residents of Dikmen Valley claimed their right to housing and TEKEL workers claimed their right to work and corresponding labor rights. The historical background and underlying causes of these problems and events are, without doubt, deeper than what is briefly stated above. However, I do not aim to give a systematic analysis of these movements and conflicts here; my primary aim is rather to reflect on some theoretical considerations and implications derived from those cases which will direct, as this dissertation proceeds, my inquiry about the philosophical thinking on human rights.

The first consideration is that the parties to these conflicts and movements framed their demands in terms of ‘rights’. The *first question* is to what extent the rights claims of participants in these struggles can be considered as genuine human rights. As I mentioned before, the rights associated with these struggles, the right to housing and the right to work, are included in important human rights documents, especially among the catalogue of socio-economic rights. However, there are at least two features of rights demands in these cases that make them different from the discussion of socio-economic rights within the mainstream human rights literature. Firstly, the mainstream human rights literature focuses on socio-economic rights understood mainly as part of the right to an adequate standard of living (i.e., on measuring the right to an adequate standard of living and analyzing the nature of related legal and social welfare guarantees) and the analysis of the right to work and related labor rights are comparatively little studied in the economic rights literature (with the exception of child labor, which has received considerable attention).⁵¹ Secondly, the mainstream human rights literature defines human rights as rights all human *individuals* have in virtue of being a human. However, in the cases I mentioned, there is a *collective* struggle aspect with respect to those rights.⁵² This is clearer with respect to labor rights including the rights of freedom of association and collective bargaining. There is also, perhaps less obviously, a collective struggle aspect to the right to the city and housing as it is the poor and marginalized segments of an urban population that raise these rights claims. In fact, the slogan of Dikmen Valley residents is: *people* have a right to housing. And, in the second case the people are having a

⁵¹ Hertel, “Human Rights and the Global Economy,” 286.

⁵² Here, by collective struggle aspect, I do not refer to the notion of group rights within the human rights literature. Instead, I am referring to the process aspect of, especially, labor rights. Within the labor movement the emphasis is on the *process* of collective struggles for rights rather than the *outcome* aspect that rights are enjoyed individually. I will discuss the process and outcome distinction in section 3.5.

collective struggle as *workers*.⁵³ In short, it needs to be explored to what extent the rights claims raised in these cases are genuine human rights claims and how the mainstream literature on socio-economic human rights needs to be interpreted and modified in order to analyze the collective aspect of those rights-struggles.

The second consideration is about the *justification* of human rights within the practice of the struggle for rights. In both cases there is an inclination to relate the demands for rights with a conception of humane life and human dignity. For instance, as I quoted at the beginning of section 1.2.1, the residents of Dikmen Valley state their demands as: “What we want is just a house to live in and to live a humane life.”⁵⁴ Similarly, with respect to the worker’s movement, Özügürlü mentions that, in field studies, they have begun to hear a pretext for being organized in trade unions which is: “in order to be seen as a human being”; “in order to protect my dignity.”⁵⁵ The *second set of research questions* following from these cases for a philosophical inquiry is: How can these rights claims within these cases be *justified*? What are the *reasons* of the participants in these struggles to claim those rights they are demanding? How can the underlying referent (of human dignity) be reconstructed in a way that is faithful to the practice of struggles for rights?

The third consideration is that participants in both struggles perceive their struggle for specific rights to be connected with larger socio-economic structures. For instance, Tarık Çalışkan, a leading figure of the Dikmen Valley resistance, states that their struggle is both a struggle for rights and a class struggle. He argues that there is a systemic problem and the threat they are facing cannot be perceived independently of widespread neoliberal policies which apply the market-driven, profit-making mentality to the use of urban spaces and the housing problem.⁵⁶ In fact, the non-governmental organization People’s Houses (*Halkevleri*) which has been one of the most active participants in the resistance movements against urban transformation projects in various cities acts as an umbrella organization covering various rights struggles including struggles for the right for free education, the right for free medical treatment, the right to water resources (against the hydroelectric plant projects) and the right to free public transport. In their analysis, these different struggles are connected and result from problems caused by a general scheme of socio-economic structure. Rights struggles,

⁵³ Without doubt it is possible to combine the idea of collective and group rights with ontological individualism. For instance, it possible to imagine a conception of human rights according to which it is only *individuals* who possess human rights but at the same time there exists structures produced by the interaction of those individuals which made some individuals vulnerable and oppressed. They can demand rights especially because of their disadvantaged position in those structures.

⁵⁴ For reference, see footnote 25 above.

⁵⁵ Özügürlü, “The TEKEK Resistance Movement,” 184.

⁵⁶ Personal communication on 26.07.2012.

according to this perception, are part and parcel of a general struggle for social change. The relationship between rights struggles and the socio-economic structures (or in the terminology of class analysis with the class struggle) is the third theoretical consideration derived from the cases examined.

1.4 Conclusion

In this chapter, I have given two examples of rights struggles from the recent history of Turkey. The cases are meant to be illustrative (rather than exhaustive) of the use of the idea of (human) rights in situations of political conflicts and contestations. The next step is to explore whether the rights claims that arise in these conflicts are genuine human rights claims and if they are, then how they are justified in practice. In order to do that, we first need an overview of the philosophical thinking about the nature, content and justification of human rights. The next two chapters start to make such an overview by examining two dominant views about the philosophical thinking on human rights: the *naturalistic conception* and the *political conception*. In chapters 2 and 3, I will examine the general characteristics and some prominent versions of the naturalistic and political conceptions of human rights respectively. I will also examine the implications of each conception's general perspective on human rights for an evaluation of the claims that there is a human right to work and a human right to adequate housing.

2 The Naturalistic Conception of Human Rights

2.1 Introduction: different conceptions of human rights

In the previous chapter, I have described some rights struggles in the context of the right to housing and the right to work. One of the main questions of my inquiry is whether those rights people in these struggles claim are genuine human rights claims. I have mentioned that these rights are listed as human rights in the main human rights documents. However, in the light of the disputes and philosophical inquiries about what human rights are taken to be and philosophical objections that some items on those lists are not genuine human rights, references to the international treaties and lists of human rights would not settle the matter about the ‘existence conditions’ of those rights.⁵⁷

The usual state of the art in philosophical discussions about human rights is to develop various *conceptions* of human rights each of which offer answers to a set of philosophical questions about the *nature*, *content* and *justification* of human rights. The next step is to assess whether the items in the main human rights documents register as human rights on this particular conception of human rights. Therefore, asking the apparently straightforward question with respect to those rights struggles whether the right to work and the right to housing should be considered as human rights takes us to the core of these conceptual questions about human rights. It requires some patience to review the different conceptions of human rights in the philosophical literature, the disagreements between which are complex.

What are the main features of a conception of human rights? Thomas Pogge points out that a conception of human rights has two main components:

– the *concept* of a human right used by this conception, or what one might also call its *understanding* of human rights, and

⁵⁷One frequent objection is to the ‘notorious’ right to periodic holidays with pay. For instance see Griffin, *On Human Rights*, 5,16,186,209; Maurice William Cranston, “Are There Any Human Rights?,” *Daedalus* 112, no. 4 (1983): 13. The word ‘notorious’ is used in this context by Allen Buchanan: “Consider, for example, the notorious ‘right to periodic holidays with pay’ and the right to ‘the highest attainable standard of physical and mental health’ . These are not plausibly included among human rights for the simple reason that it is far-fetched to say that their realization is necessary for having the opportunity for a decent human life” Allen Buchanan, “Equality and Human Rights,” *Politics, Philosophy & Economics* 4, no. 1 (2005): 78. The phrase ‘existence condition’ is used by Sumner in his analysis of the moral foundation of rights, Leonard W. Sumner, *The Moral Foundation of Rights* (Oxford: Oxford University Press, 1987) and later applied by James Griffin to the idea of human rights, Griffin, *On Human Rights*, 38. ‘Existence conditions’ can reasonably be used interchangeably with the term ‘grounds’ which is frequently used in the literature on the foundations of human rights and refers to philosophical arguments and reasons provided to support that human rights in general or a specific human right exist. The presumption is roughly that human rights as norms of political morality require philosophical justification or grounding rather than just recognition in positive law documents. There are some positions that deny such a presumption that human rights need a justification. I will discuss such positions in section 2.6.

– the *substance* or content of the conception, that is, the objects or goods it singles out for protection by a set of human rights.⁵⁸

In the light of this, we can say that a conception of human rights is concerned with two main questions related to these parts: What are human rights? And which rights are human rights?

In a similar vein, Matthias Risse makes a distinction between the *concept* and various *conceptions* of human rights.⁵⁹ According to Risse's distinction a concept of human rights is the *idea* of human rights which, following Joshua Cohen, has three features: they are *universal* in the sense that they are owed by every political society and owed to all individuals, they are requirements of political morality whose force does not depend on their being expressed in enforceable law; they are especially *urgent* requirements of political morality. Moreover, an account of human rights has to meet two methodological assumptions. First, if there are human rights they must meet the condition of the *fidelity* assumption: a substantial range of human rights should be identified by the main human rights documents. Second, any proposed list of human rights should be *open-ended*: we can, through normative reasoning, argue in support of human rights that have not previously been enumerated as human rights and interpret rights defined in abstract terms for application.⁶⁰ Echoing Rawls's distinction⁶¹ between a conception and various conceptions of justice, Risse argues that there can be various conceptions of human rights that have the same concept of human rights; they may have those features and meet the conditions specified by Cohen. Yet, they can still have different particular understandings of human rights. One particular way of understanding human rights would be as protections of essential features of personhood.⁶² A different way of understanding human rights is that human rights are rights individuals have as members of the global and political order.⁶³ After making this distinction between the concept and conceptions of human rights, Risse lists four conditions for a *conception* of human rights.⁶⁴

⁵⁸ Thomas Pogge, "The International Significance of Human Rights," *The Journal of Ethics* 4, no. 1–2 (2000): 45, emphasis original.

⁵⁹ Mathias Risse, "A Right to Work? A Right to Leisure? Labor Rights as Human Rights," *Law & Ethics of Human Rights* 3, no. 1 (2009): 1–39.

⁶⁰ Joshua Cohen, "Is There a Human Right to Democracy?," in *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, ed. Christine Sypnowich (Oxford: Oxford University Press, 2006), 229–230.

⁶¹ John Rawls, *A Theory of Justice: Revised Edition* (Cambridge: The Belknap Press of Harvard University Press, 1999), 9.

⁶² See, for instance, Griffin, *On Human Rights*. I will examine Griffin's account in more detail in this chapter (section 2.3.2).

⁶³ See, for instance, Joshua Cohen, "Minimalism about Human Rights: The Most We Can Hope For?," *Journal of Political Philosophy* 12, no. 2 (2004): 190–213; Mathias Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights," *European Journal of Philosophy* 17, no. 2 (2009): 277–304. I will examine such membership accounts in chapter 3 (sec. 3.3.2).

⁶⁴ Risse claims that any full-fledged conception of human rights would offer answers to all these questions: "Is there

Apart from the issues of the concept and content of human rights, one aspect of human rights which is especially important for philosophical discussions is the question of how human rights may be philosophically *justified*. Justification in its relation to moral philosophy means providing reasons for the validity of moral principles and concepts such as rights, duties, etc. The disputes about the philosophical justification of human rights are centered on two questions: *do human rights require philosophical justification? If they do, what kind of justification?* The discussion about justification of human rights is also closely related to the discussion on the philosophical foundations of human rights. Philosophers have tried to *justify* human rights by appealing to various ideals such as universal human interests, agency, human dignity as the *grounds* or *foundations* of human rights.

Several philosophical conceptions of human rights are advanced with each giving specific answers to these questions about the *nature*, *content* and *justification* of human rights as well as each combining moral, political and legal aspects of human rights in a particular way (or giving priority to one or more of these aspects). Hence given the diversity of aspects of and questions about human rights, there is no straightforward way to classify philosophical views of human rights. Nevertheless, two approaches are often perceived to be dominant in the philosophical literature on human rights; the ‘traditional’, ‘naturalistic’, ‘natural law conception’ and the ‘practical’, ‘political’, ‘positive law’ conception of human rights, especially within the Anglo-American mainstream philosophy of human rights.⁶⁵

Although rarely found in their ideal typical forms, these two approaches (I will hereafter call them the *naturalistic* conception and the *political* conception for short) are dominant and

a basis, a set of features of human beings, on which such rights are grounded?”, “What is the function that human rights have in the global order, and to what extent does this help define what human rights are?”, “Can the list of human rights that we find in the standard documents be derived from a certain principle?”, “What should be done about human rights violations, and who ought to do it?” It should also clarify why it is worth having such a conception and why the language of human rights is appropriately used by this conception. Risse, “A Right to Work? A Right to Leisure?,” 16.

⁶⁵ Some writers who classify conceptions of human rights into these two broad perspectives albeit with different labels are Jean L. Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization,” *Political Theory* 36, no. 4 (2008): 578–606; Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Joseph Raz, “Human Rights Without Foundations,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 321–337; Allen E. Buchanan, *The Heart of Human Rights* (Oxford: Oxford, 2013); Pablo Gilabert, “Humanist and Political Perspectives on Human Rights,” *Political Theory* 39, no. 4 (2011): 439–467; S. Matthew Liao and Adam Etinson, “Political and Naturalistic Conceptions of Human Rights: A False Polemic?,” *Journal of Moral Philosophy* 9, no. 3 (2012): 327–352. Cohen differentiates between ‘traditional’ and ‘political’ conceptions of human rights. Beitz differentiates between the ‘naturalistic’ view and the ‘practical’ view of human rights. Gilabert differentiates between ‘humanist’ and ‘political’ perspectives on human rights. Buchanan differentiates between ‘Orthodox or Moral’ theories and ‘Political or Practical’ theories. What are called political/institutional/practical approaches and naturalistic/humanist/orthodox/ traditional approaches in the literature will be hereafter referred to by the terms the political approach/conception and the naturalistic approach/conception respectively.

perceived to be alternative philosophical approaches to human rights⁶⁶ The goal of opening up a new perspective informs this dissertation. For this reason, I start by characterizing these dominant positions: the naturalistic conception in this chapter and the political conception in the next chapter. As I cannot offer an examination of all *prima facie* plausible conceptions that can be classified under these views, I will first make a general characterization of each conception and then examine some prominent versions offered in the literature. In a next step, I will examine the implications of each conception's general perspective on human rights for an evaluation of the claims that there is a human right to work and a human right to adequate housing.

This chapter is structured as follows. First, I will briefly track the origins in the doctrine of natural law and natural rights. Then, I will formulate conditions which make a rights theory a natural rights theory, and in turn, make a human rights theory a naturalistic theory of human rights (sections 2.2 and 2.3.). I will critically examine three recent versions of the naturalistic conception of human rights, namely the accounts developed by Alan Gewirth, James Griffin and John Tasioulas (sections 2.3.1, 2.3.2 and 2.3.3 respectively). In section 2.4, I will examine the implications of the naturalistic conception for the claims that there are human rights to work and housing. In section 2.5, I will outline the general difficulties and objections raised against the naturalistic conception of human rights. In section 2.6, I examine the question of whether human rights require justification. The final section summarizes my conclusions.

2.2 The nature of natural rights

Although the use of the term 'human rights' began at the end of the eighteenth century (for instance the term '*les droits de l'homme*' in the French Declaration of the Rights of Man and

⁶⁶ I do not claim that this typology of different conceptions of human rights (naturalistic and political) is exhaustive.

There can be other conceptions of human rights such as discourse-theoretic conceptions of human rights as I will examine in more detail in chapter 4. Instead, like Gilabert, "Humanist and Political Perspectives"; Liao and Etinson, "Political and Naturalistic Conceptions", I start from a current predicament within the Anglo-American philosophical literature that two opposing conceptions (political *versus* naturalistic) dominate that literature. Especially the self-proclaimed adherents of the political conception (e.g. Raz and Beitz) position their approaches in opposition to the naturalistic conception. This dichotomous view serves as a background for my introduction of the discourse-theoretic conception of human rights into the philosophical discussion on human rights. One can also find different classifications of the theories of human rights such as a distinction between "Choice" and "Interest" theories of rights (see for example, Peter Jones, *Rights* (Oxford: Palgrave Macmillan, 1994); William A. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004); Jeremy Waldron, *Theories of Rights*, Oxford University Press (Oxford: Oxford University Press, 1984) or as Dembour's distinction between four schools of thought in the human rights academic literature: natural school, deliberative school, protest school and discourse school, Marie-Bénédicte Dembour, "What Are Human Rights? Four Schools of Thought," *Human Rights Quarterly* 32, no. 1 (2010): 1–20.

of the Citizen (1789)), it gained wide currency in the middle of the twentieth century especially after the Universal Declaration of Human Rights (1948).⁶⁷ While the appearance of the term ‘human rights’ on the historical stage is relatively recent, its precursor term ‘natural right’ (*ius naturale*) has been on stage since the late Middle Ages.⁶⁸ The idea of a natural right has been closely related to the idea of ‘natural law’ and natural rights were generally believed to be derived from natural laws.

The belief in the existence of a natural moral code based upon the identification of certain fundamental and objectively verifiable human goods formed the basis of the natural law doctrine. Natural Moral Law states that there is a natural order to our world (determined by a supernatural power in the theological view) that should be followed. Although the doctrine of natural law originated in the philosophy of Greek and Roman antiquity, St. Thomas Aquinas gave it its most influential statement in the 13th century.⁶⁹ According to the classical-theological canon of natural law developed by Aquinas, there are natural dispositions in human beings to reason which serves as the rule and measure of human actions:

The natural law is promulgated by the very fact that God instilled it into man’s mind so as to be known by him naturally. *Summa Theologica*, Question 90, Article 4.⁷⁰

[I]t is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. *Summa Theologica*, Question 91, Article 2.⁷¹

The transformation of theological-classical natural law into modern natural rights theory (which is also called the secularization of the doctrine of natural rights into human rights) went through the Protestant Reformation and the Age of Enlightenment and can be traced

⁶⁷ In his book, *The Last Utopia: Human Rights in History* (London and Cambridge, MA: Belknap Press, 2010), Samuel Moyn argues that it was even later (only in the mid-1970s), when other utopian ideologies—socialism, anti-colonialism, and anti-communism—fell by the wayside, that the idea of human rights came to occupy a central position in international discourse and political activism.

⁶⁸ According to James Griffin the two terms ‘human rights’ and ‘natural rights’ come from the same continuous tradition: “they have largely the same extension, though different intensions.” Griffin, *On Human Rights*, 9. As, Griffin himself acknowledges this statement is occasionally denied. This chapter is an attempt to explore the relation between natural rights and human rights.

⁶⁹ Although the idea of a natural right is present in the philosophies of Socrates and Plato, among the Greek philosophers Aristotle has often said to be the father of natural law. Max Salomon Shellens, “Aristotle on Natural Law,” *Natural Law Forum* 4 (1959): 72. The Stoics of late Antiquity like Cicero and Seneca also had a natural-law conception. For instance, Cicero’s classic definition of the law of nature is as follows: “true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting. . . . one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God”, Marcus Tullius Cicero, *De Re Publica; De Legibus* (Cambridge, MA: Harvard University Press, 1928), 211.

⁷⁰ St. Thomas Aquinas, *Summa Theologica*, Benziger Bros. Ed. (Christian Classics, 1947), 1332.

⁷¹ *Ibid.*, 1334.

back to the writings of Enlightenment thinkers such as Thomas Hobbes, John Locke and Immanuel Kant among others.⁷²

What is to count as a natural rights theory? In order to give a systematic exploration of a natural right and its existence conditions, one can start from the concept of a right. The beginning of wisdom in the analysis of the concept of a right resides in the famous classification of “fundamental legal conceptions” given by Wesley Hohfeld.⁷³ By virtue of abundant illustrations from juridical arguments, Hohfeld shows that we use the term ‘right’ to cover four different forms of entitlements which he calls *rights*, *privileges*, *powers* and *immunities*. Hohfeld maps the logical relations among these fundamental conceptions organizing them into two tables of opposites (contradictories) and correlatives (equivalents):

Jural Opposites	{ right	privilege	power	immunity
	{ no-right	duty	disability	liability
Jural Correlatives	{ right	privilege	power	immunity
	{ duty	no-right	liability	disability

Table 1: Hohfeldian scheme of jural opposites and correlatives.⁷⁴

Hohfeld claims that we use the term ‘right’ to mean these four forms of legal relationships and that this state of affairs results in confusion. He proposes that usage of the term should be limited to the first category in the table, namely to what is called a ‘claim’ or ‘claim-right’ in the literature (or what Hohfeld himself calls “a right in the strictest sense”).⁷⁵ Hohfeld’s distinctions were developed in the analysis of legal rights, but they have applicability to the moral sphere. For instance Hohfeld’s claim-right is generally regarded as coming closest to the concept of individual rights used in political morality.⁷⁶

⁷² Leonard Sumner usefully divides the natural rights tradition into its classical and modern periods. In his characterization the heyday of the classical period was the seventeenth century which featured the great treatises by Grotius, Pufendorf and Locke. The tradition’s classical period came to an end in the British homeland by the second half of the nineteenth century with the rise of utilitarianism on the one hand and idealism on the other. What Sumner calls the modern period of the tradition is the period of revived interest in natural rights after the Second World War at least in Anglo-American philosophy and politics. Sumner, *The Moral Foundation of Rights*, 94. Peter Jones, on the other hand, distinguishes between a Hobbesian and a Lockean conception of natural rights, Jones, *Rights*, 73–77. In this dissertation, I am mostly interested in the conceptual connection between the terms ‘human right’ and ‘natural right’ and I will be dealing mainly with contemporary accounts of human rights which are understood as belonging to the naturalistic tradition. For a detailed history of natural rights theories see Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979).

⁷³ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. Walter Wheeler Cook (New Haven and London: Yale University Press, 1919).

⁷⁴ *Ibid.*, 36.

⁷⁵ *Ibid.*

⁷⁶ For instance in his project of developing an account and justification of human rights, Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982), confines himself to what Hohfeld called ‘claims’ or ‘claim-rights’.

To say that A has a claim *right* to X usually means that people have a *duty* not to interfere with A's having or doing X. This duty can range from a negative duty of non-interference, to the positive duty of securing A's access to X. Although Hohfeld's categorization helps to clarify different forms of entitlement denoted by the term right, it would be mistaken to suppose that every right that is asserted must belong to one and only one of Hohfeld's four categories. Instead a single assertion of a right usually means a cluster of different Hohfeldian elements. For instance if I say I have a property right in a house, this would typically imply my *claim-right* that others should refrain from damaging my house or entering it without my permission, my *privilege* as an owner to the personal use of the house, my *power* to sell the house or rent it, and my *immunity* from other's disposal of the house without my consent. Therefore rights usually consist of a complicated cluster of Hohfeldian elements.⁷⁷

If we use the term 'right' to refer to these four different forms of entitlement, what makes them all *rights*? In other words, what is their common feature that makes them "all species of a single genus"?⁷⁸ Two rival accounts which attempt to capture the essential defining feature of rights and the relation between duties and rights have been proposed; on the one hand there is the 'choice' or 'will' theory of rights and on the other hand, there is the 'benefit' or 'interest' theory of rights.⁷⁹ According to the choice theory having a right is essentially a matter of having a choice; it gives the right-holder control over another's duty. The best

⁷⁷ Different terminology is used to denote the complex inner structure of the most familiar rights. For example, Leif Wenar of 'molecular rights' which are complex rights formed by the bonding together of 'atomic' incidents—privilege, claim, power, and immunity, Leif Wenar, "Rights," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy* (2011), URL = <<http://plato.stanford.edu/archives/fall2011/entries/rights/>> (Accessed on 16 December 2013). According to Herbert L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), liberty-rights (what Hohfeld calls 'privileges') exist within what he describes as a 'protective perimeter' of claim-rights. Another common terminology is 'first-order' and 'second-order' rights. First-order rights are rights that are related to first-order rules which require that people perform or refrain from performing particular actions. Claims and privileges are first-order rights. The second-order rights are the rights that are related to the second-order rules, rules that specify how agents can introduce and change first-order rules. The 'second-order' rights are your rights concerning the alteration of the first-order rights. Powers and immunities are second-order rights with powers being second-order counterparts of duties whereas immunities are second-order counterparts of claims. Cf. Wenar, "Rights"; Sumner, *The Moral Foundation of Rights*.

⁷⁸ Jones, *Rights*, 7.

⁷⁹ According to Wenar the will theory and the interest theory are two main theories about the *function* of rights: "each presents itself as capturing an ordinary understanding of what rights do for those who hold them", Wenar, "Rights." The Hohfeldian incidents and clusters of those incidents which denote the internal structure of rights are, on the other hand, about the *form* of rights. Choice and interest theories are not always conceived to be mutually exclusive. Some writers argue that features of both theories are essential to the analysis of rights. Jones cites George W. Paton, *A Textbook of Jurisprudence* (Oxford: Clarendon Press, 1972); Richard E. Flathman, *The Practice of Rights* (Cambridge: Cambridge University Press, 1976); Carl Wellman, *A Theory of Rights* (Totowa, NJ: Rowman & Allanheld, 1985) as examples, Jones, *Rights*, 36. A description of both the form and function of rights together constitutes an analysis of rights.

known contemporary proponent of a choice or will theory of rights is Herbert Hart.⁸⁰ If an individual A has a duty to do something and if another individual B to whom the duty is owed is in a position to control the performance of the duty, this degree of control makes B a right-bearer on Hart's account. For example, if A makes a promise to B, A has the duty to keep the promise, but it is a duty from which B can waive or release A, hence B has the corresponding right. By the same token, a creditor can be said to have a right correlative of the duty of her debtor because the debtor's duty to repay is subject to the discretion of the creditor.⁸¹ Hence, according to a choice-theory of rights those duties over which an individual can exercise control can entail correlative rights. In Hohfeldian terms, choice theorists assert that every right includes a Hohfeldian power over a claim; A has a duty and B has Hohfeldian power in relation to that duty.

Although Hart's choice theory is applicable fundamentally for an analysis of ordinary legal rights and given the fact that, in his later writings, he has forsaken the choice theory regarding moral rights, we can still talk of a model of moral rights as 'protected choices'.⁸² The model of rights as protected choices takes the values of autonomy and self-determination as central and says that to regard people as having certain moral rights is to regard them as autonomous beings within the domains specified by the content of the rights. In this sense choice theory captures an essential link between rights and an individual's autonomy, "a link which indicates the distinctive normative function performed by the concept of rights in our moral language."⁸³

However, the conception of rights as protected choices is counterintuitive with respect to paradigmatic human rights. For example, if we think of the fundamental human rights such as the right to life, freedom from torture, the right to a fair and public trial, few of us believe that we have these rights because we can waive the corresponding duty-bearers from their duties not to kill, not to torture, etc. Moreover, according to choice theory, rights cannot be ascribed to beings incapable of choice such as infants, animals, mentally disabled and comatose adults, as well as past and future generations. The alternative 'interest' or 'benefit' theory which is based on Jeremy Bentham's analysis of legal rights will be of more help in understanding those rights.

⁸⁰ Herbert L. A. Hart, "Are There Natural Rights?," *Philosophical Review* 64, no. 2 (1955): 175–91; Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory*. See also Thomas. Kearns, "Rights, Benefits, and Normative Systems," *Archiv Für Rechts- Und Sozialphilosophie* 61 (1975): 465–83; Sumner, *The Moral Foundation of Rights*.

⁸¹ Jones, *Rights*, 32.

⁸² For example, see Sumner, *The Moral Foundation of Rights*.

⁸³ Jones, *Rights*, 34.

According to Bentham rights are essentially ‘benefits’ and whoever benefits from a duty possesses a right.⁸⁴ In Bentham’s thinking, an individual A can be said to have a right if another individual B has a duty to perform (or refrain from) an act which is in A’s interest. Originally associated with Bentham’s analysis, interest or benefit theory has been defended in various forms by modern writers such as David Lyons, Joseph Raz and Neil MacCormick.⁸⁵ Interest theory is comprehensive in the sense that it counts unwaivable rights and the rights of incompetents as rights the possession of which is in the interest of rights-holders. As such, interest theory also taps into the plausible relation between holding rights and well-being. But interest theory also faces some problems such as that there can be third-party beneficiaries who benefit from some duties’ being met without being right-holders. For instance, if I perform my duty to return 100 € I borrowed from you, there can be other beneficiaries than you, such as your family, a person you owed money, etc. Neither Bentham nor other modern defenders claim that all these beneficiaries can claim rights. For instance, in his qualified version of Bentham’s theory, Lyons holds that one has a right in respect of another’s duty or obligation only if one is “the direct, intended beneficiary of that duty or obligation.”⁸⁶ Raz takes this analysis one step further and holds that an individual X has a right “if and only if X can have rights, and other things being equal, an aspect of X’s well-being is a sufficient reason for holding some other person(s) to be under a duty.”⁸⁷ According to Raz’s view rights are understood as *grounds* of duties; X can be said to have a right (whether in moral theory or legal system) whenever the protection or advancement of some interest of hers is recognized (by the theory or the system) as a *reason* for imposing duties or obligations on others. Hence, the second model of rights as ‘protected interests’ takes the value of welfare as central and says that to regard people as having certain moral rights is to regard the welfare of the individual as important such that it requires protection.

As is clear from the usage of the concept, rights admit of different varieties—legal, customary, moral, etc. Among the several varieties of rights, a distinction between conventional and moral rights is especially important for the purpose of understanding natural rights. Conventional rights are the products of a conventional rule system (e.g. a legal right is a product of a legal rule system). Moral rights can be understood by comparing them to

⁸⁴ Ibid., 27.

⁸⁵ David Lyons, “Rights, Claimants, and Beneficiaries,” *American Philosophical Quarterly* 6, no. 3 (1969): 173–85; David Lyons, “Human Rights and the General Welfare,” *Philosophy & Public Affairs* 6, no. 2 (1977): 113–29; Joseph Raz, “Practical Reason and Norms,” 1975; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Neil MacCormick, “Rights in Legislation,” in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart*, ed. Peter Michael Stephan Hacker and Joseph Raz (Oxford: Clarendon Press, 1977), 189–209.

⁸⁶ Lyons, “Rights, Claimants, and Beneficiaries,” 176.

⁸⁷ Raz, *The Morality of Freedom*, 166.

conventional rights and extrapolating the existence conditions of conventional rights to those of moral rights. Extrapolation the existence conditions of conventional rights to moral rights leads to the supposition that moral rights are the products of non-conventional rule systems, thus to the supposition that moral rights are natural rights.⁸⁸ The natural rights tradition seeks to explain the moral force of rights by embedding them in a system of rules which, by virtue of being natural rather than conventional, has moral force.

What makes a right a *natural* right? There is not a unique answer to this question in the natural rights tradition. Neither the classical nor the modern period in the tradition yields a unanimously endorsed account of the nature of natural rights. As is occasionally pointed out by critics and also acknowledged by defenders, the idea of natural rights is ambiguous and abstract. The gist of the idea of a natural right is that it is a non-conventional right; it is a right that exists independently of the laws, governments and conventions of any existing society. But, what are the existence conditions of natural right(s)? We can reconstruct what is widely accepted in the natural rights tradition. Sumner provides such a reconstruction. He suggests four conditions which are individually necessary and jointly sufficient to count as a natural rights theory: “As a rough initial approximation we may say that a moral theory is a natural rights theory just in case (1) it contains some moral rights, which (2) it ties to the possession of some natural property, and which it treats as both (3) basic and (4) objective.”⁸⁹ Let us explicate each of these four conditions.

The first condition is conceptual: “a natural rights theory must affirm the existence of some moral rights and thus must employ some conception of a right.”⁹⁰ Hence, the first condition entails that a natural rights theory is a *rights theory* as it contains some moral rights but it does not explain what it means for those rights to be natural. The second condition takes us one step further towards such an explanation. It suggests that the criterion for a natural right must itself be a natural property. In Sumner’s words:

⁸⁸ Sumner, *The Moral Foundation of Rights*, 92.

⁸⁹ Ibid., 95.

⁹⁰ Ibid. Here one can employ two different models of a right mentioned before; the model of a right as protected choices or protected interests. According to each model the function of a right is to protect some value (welfare, interests in the one model and choice or autonomy in the other model) on the part of the right-holder and this function unifies the Hohfeldian elements into a cohesive molecular structure of a right. What the two conceptions count as rights (their extension) differ correspondingly. Because autonomy can be considered as part of individual welfare, anything which counts as a right under the choice conception will also count as a right under the interest conception but not vice versa. (Ibid., 96.) According to Sumner, the model which adopts the model of protected choices for a characterization of moral rights has more merits for identifying important theoretical boundaries. Here I continue the discussion of the characterization of moral rights while being agnostic about the relative merits of these two conceptions.

A natural rights theory therefore must assign (at least some of) its rights to a class of subjects determined by their common and exclusive possession of this natural property. . . . [W]hat, in this context, makes a property a natural property? Two requirements are obvious. First, the property must be empirical and thus whether or not an individual possesses it must be ascertainable by ordinary empirical means. . . . Secondly, the property must not logically require the existence of any particular institution or social practice. Thus conventional properties such as citizenship, social status, and wealth are excluded.⁹¹

The requirement that the criterion for a natural right must itself be a natural property can be found in the modern natural rights theories of McDonald and Brown.⁹² McDonald argues that people continue to suppose that they have ‘natural’ rights, or rights as human beings, independently of the laws and governments of any existing society. If, for instance, the laws of every existing society condemn a human being to be a slave, he, or another human being on his behalf, may hold that he has a right to be free. But since, *ex hypothesi*, this right is denied by every existing law and authority, it must be a right possessed independently of them and it must be derived from *another source*. The slave has a right to be free in virtue of his status of being a man like any other man. This, however, is a *natural* status as opposed to one determined by social convention. “Every man is human ‘by nature’ and no human being is ‘by nature’ a slave of another human being.”⁹³ Similarly, Brown states; “[i]t has been widely supposed that all men have inalienable rights by reason of certain properties common to all men and nothing else. On this supposition, the term “natural” is used in reference to the set of unspecified defining properties.”⁹⁴ So far, these two conditions imply that a natural rights theory is any moral theory which contains rights and the criterion of those rights are natural properties.

The third condition is structural and it is related to the place of rights in a moral theory. According to this condition, a natural rights theory treats rights (and only rights) as *morally basic*.⁹⁵ Rights principles and only rights principles are located at the most basic level in the structure of a natural rights theory. Therefore, in Sumner’s formulation “a theory is a natural rights theory only if rights are the moral category fundamental to the theory, thus only if the

⁹¹ Ibid., 102.

⁹² Margaret MacDonald, “Natural Rights,” *Proceedings of the Aristotelian Society, New Series* 47 (1946): 225–50; Stuart M. Jr. Brown, “Inalienable Rights,” *The Philosophical Review* 64, no. 2 (1955): 192–211.

⁹³ MacDonald, “Natural Rights,” 228.

⁹⁴ Brown, “Inalienable Rights,” 196.

⁹⁵ The distinction between *right-based*, *duty-based* and *goal-based* political theories was suggested by Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 169–173. Mackie has applied the same classification to moral theories in general in J.L. Mackie, “Can There Be a Right-Based Moral Theory?,” *Midwest Studies in Philosophy* 3, no. 1 (1978): 350–359. The classification is dependent on which of these moral concepts of a goal, right or duty is taken as fundamental. All three concepts can figure in a moral theory, the distinction among the different groups depends on the basis or principle on which the moral requirements are generated and justified.

theory's base consists exclusively of rights principles."⁹⁶ A theory will fail this condition if; i) it has no assignable base (it has no basic principles at all), or ii) it is duty-based or goal-based, iii) or it is a mixed theory (its base consists of principles drawn from different moral categories of rights, duties or goals).

The fourth condition is related to what we may call the ontological status of basic rights in a moral theory. The basic moral rights can be claimed to be subjective (if their existence is dependent on some subjective state or activity—whether actual or hypothetical—of some subjects) or objective (their existence is independent of all subjective states and activities). Sumner argues that there are two methods of grounding rights depending on whether they are claimed to be subjective or objective; the constructive model (e.g. contractarian theories) and the realist model respectively. If rights are subjective then their existence is a matter of creation or invention and if they are objective their existence is ultimately a matter of discovery of principles which accurately represent moral facts. Natural rights theories, according to the formulation of the fourth condition, are committed to the realist model and to the accompanying claim of the objectivity of rights.

If we recapitulate the explication of the four conditions, a natural rights theory is any moral theory which 1) employs a model of rights, 2) assigns some set of rights to some set of individuals on the basis of some natural criterion, 3) treats these rights (only rights) as morally basic and 4) claims that they are objective.⁹⁷ If we confront these conditions with the rights theories available in the literature, it is unlikely that we will find a single theory that meets all four conditions. For instance, the self-proclaimed natural rights theory of Finnis fails the third condition because its basic principles postulate not rights but goods.⁹⁸ Some other theories fail

⁹⁶ Sumner, *The Moral Foundation of Rights*, 104. The third condition stipulates that rights might be *morally* basic in a theory. Hence it prohibits grounding rights principles in other moral principles but does not prohibit grounding them in other non-moral yet normative principles such as rules (of principles) of a theory of rationality. Duties and goals are two other moral categories around which moral principles can be formulated.

⁹⁷ In Sumner's reconstruction of the conditions for counting as a natural rights theory, the first condition is that the moral theory employs the model of rights as 'protected choices'. Sumner argues that the adoption of the model of rights as protected choices against the model of rights as protected interests helps to mark the distinction between natural right theories and natural duty theories. However, as Sumner himself acknowledges, in this form the first condition excludes the theories which are regarded both by the authors themselves and others as natural rights theories especially the theories which dominated the classical period of natural rights traditions. The modeling of natural rights on the choice conception, says Sumner, "seems to have been a distinctively modern innovation" *Ibid.*, 109. In order to be as faithful as possible to what is commonly understood as the natural rights tradition, I make no preference between interest or choice conception of rights in the first condition.

⁹⁸ Finnis argues that there are, first, "a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized", John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 23.

the fourth condition because they use a constructivist methodology.⁹⁹ However the first two conditions are widely satisfied by available natural rights theories. Hence, we can say that the natural rights theories have two basic characteristics: 1) they contain some rights (no matter how these rights are conceptualized as protected interests, protected choices, or a combination of the two) and 2) the criterion of possessing those rights is itself a natural property.

2.3 Natural rights and human rights

If we now turn back to the understanding of human rights, in the last century the language of natural rights was largely replaced by the language of human rights. According to Finnis, ‘human rights’ is a contemporary idiom for ‘natural rights’ and he uses the terms synonymously. It is a widely accepted view that the two sorts of rights are closely related.¹⁰⁰

The long-standing understanding of “human rights as natural rights” embraces the most common and well-known definition which conceives human rights as moral rights possessed by all human beings (at all times and in all places), simply in virtue of being human.¹⁰¹ As Jean Cohen nicely summarizes:

The traditional approach frames human rights as moral rights that all individuals have by virtue of being human. Accordingly, human rights are universal and have unrestricted validity, binding all individuals and societies whatever their religion, tradition, or culture. Human rights are deemed to be the most important among moral rights—articulating especially valuable goods or interests, particularly weighty moral concerns that all human beings have. They are ascribed to all individuals equally.¹⁰²

In his *The Idea of Human Rights*, Charles Beitz provides a similar characterization of what he calls the naturalistic view of human rights:

This idea [naturalistic view] is open to several interpretations. These have at least two elements in common. First, human rights are distinct from positive rights—that is, rights actually recognized in a society, or anyway enacted in law. . . . The notion of a right existing in a state of nature is one way of conceiving of such a right, although it is not the only way. Second, human rights belong to human beings “as such” or “simply in virtue of their humanity.” This means, at a minimum, that all human beings are entitled to claim human rights. It may also mean that the grounds on which a particular human right may be claimed are available to everybody because they inhere somehow in each person’s nature or status as a human being. Putting these two points together, naturalistic conceptions regard human

⁹⁹ For example, Rawls *A Theory of Justice* (Mass.: Belknap Press of Harvard University Press, 1971) and Gilbert Harman, “Moral Relativism as a Foundation for Natural Rights,” *Journal of Libertarian Studies* 4, no. 4 (1980): 367–71.

¹⁰⁰ Finnis, *Natural Law and Natural Rights*, 198. It is also another common view that historically the idea of human rights descended from that of natural rights. I cannot get into discussion of the history of the transition of natural rights to human rights as it is beyond the scope of this dissertation.

¹⁰¹ John A. Simmons, “Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke,” in *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 185.

¹⁰² Cohen, “Rethinking Human Rights,” 581.

rights as having a character and basis that can be fully comprehended without reference to their embodiment and role in any public doctrine or practice.¹⁰³

Hence, two elements form the core of the naturalistic view. First, human rights are not contingent on existing laws and social practices. Take, for instance, the natural right to freedom mentioned above. Every person is human ‘by nature’, and no human being is ‘by nature’ a slave of another human being. If, for example, the laws of every existing society condemn a human being to be a slave, s/he or somebody else on her behalf, may yet hold the idea that s/he has a “right” to be free. “Man was born free,” said Rousseau, “and everywhere he is in chains.”¹⁰⁴ So, it might be the case that all men are not free in reality but they ought to be (ideally), independent of the laws of all particular societies. So, the idea of natural rights transcends the particular historical and political contexts. The second element that forms the core of the naturalistic view of human rights is the idea that the ground (s) (or the justificatory basis) for making a right-claim inhere(s) somehow in each person’s nature or status as a human being.

These two core elements are obliquely related to and to a large extent overlap with the first two conditions that a moral rights theory needs to meet in order to be a natural rights theory which I have reconstructed in the previous section (2.2). With respect to human rights, the second condition which states that the criterion of a natural right needs to be natural property usually turns to be membership to the species. Hence to repeat Sumner’s words: “in the natural rights tradition moral rights have standardly been assumed to be human rights, and thus membership in our species has been the most popular criterion for being a right-holder.”¹⁰⁵ As I will discuss, different theories propose different qualities as being grounds of human rights.

In this chapter, when I use the term ‘the naturalistic conception of human rights’, I am predominantly referring to contemporary philosophical accounts of human rights that propose some (not mutually exclusive) conceptions of humanity and fundamental goods as ground(s) of human rights such as the agency conception of humanity, the conception of basic interests, or the idea of human dignity and freedom.¹⁰⁶ In the remainder of this section, I will closely

¹⁰³ Beitz, *The Idea of Human Rights*, 49–50.

¹⁰⁴ Jean-Jacques Rousseau, *Discourse on Political Economy and The Social Contract* (Oxford: Oxford University Press, 1994), 45.

¹⁰⁵ Sumner, *The Moral Foundation of Rights*, 102.

¹⁰⁶ For the agency conception see Gewirth, *Human Rights: Essays on Justification and Applications*; Griffin, *On Human Rights*; for the conception of basic interests see Finnis, *Natural Law and Natural Rights*; and for the idea of freedom as the basis of human rights see Hart, “Are There Natural Rights?.” As I stated before in footnote 65, what I am calling the naturalistic conception has also been called the orthodox view (e.g. Charles R. Beitz, “Human Rights and The Law of Peoples,” in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen Chatterje (Cambridge: Cambridge University Press, 2004), 193–216 and John Tasioulas, “Taking Rights out of

examine three recent versions of the naturalistic conception of human rights proposed by Alan Gewirth, James Griffin and John Tasioulas.

I have chosen to focus on Griffin's account because it is considered to be "the most comprehensive recent effort to generate a theory of human rights from naturalistic foundations."¹⁰⁷ In particular, the adherents of the political conception of human rights such as Beitz and Raz, labelled the conceptions of human rights they are criticizing as naturalistic or orthodox conceptions and they perceived Griffin's theory of human rights as an example of the naturalistic approach.¹⁰⁸ There is not much discussion about Gewirth's account of human rights in the recent philosophical literature of human rights and it is less uncontroversial if his account can be called naturalistic. I nevertheless briefly discuss Gewirth's account in this chapter as it will be helpful in illustrating the differences between what I shall call different 'modes of justification' of human rights (see section 2.6).¹⁰⁹ Griffin provides an *ethical* justification of human rights in the sense that the right principle is derived from a substantive notion of the good whereas Gewirth provides a *moral* justification of human rights which gives moral reasons and is neutral on the question of the good life. The issue of the mode of justification (especially whether it is moral or ethical) will be pertinent to an account's vulnerability to the ethnocentrism charge – the charge that it is biased towards one tradition (i.e. Western) or a comprehensive conception of the good. After examining Griffin's theory, I briefly examine the account of Tasioulas as another example of the naturalistic view because he takes up Griffin's approach and modifies it towards a pluralistic grounding of human rights. He also positions himself against the political approaches as he defends the need to provide a moral grounding of human rights.¹¹⁰

It is worth mentioning here that there is no very clear understanding of what counts as a natural conception of human rights within the literature on political conceptions of human

Human Rights," *Ethics* 120, no. 4 (2010): 647–678); the traditional account (e.g. Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory* 1, no. 1 (2010): 31–47; Cohen, "Rethinking Human Rights") and the humanist perspective (e.g. Gilibert, "Humanist and Political Perspectives on Human Rights").

¹⁰⁷ Beitz, *The Idea of Human Rights*, 60, n. 21. Some other scholars who consider Griffin's account as 'naturalistic' are: Buchanan, *The Heart of Human Rights*, 5; Gilibert, "Humanist and Political Perspectives on Human Rights," 461 n.2; Liao and Etinson, "Political and Naturalistic Conceptions of Human Rights," 331; Raz, "Human Rights Without Foundations," 324–327; Laura Valentini, "Human Rights, Freedom, and Political Authority," *Political Theory* 40, no. 5 (July 12, 2012): 594 n.9.

¹⁰⁸ Beitz, *The Idea of Human Rights*, 60–66; Raz, "Human Rights Without Foundations," 324–327.

¹⁰⁹ Some scholars who consider Gewirth's account of human rights as naturalistic are: Dembour, "What Are Human Rights? Four Schools of Thought," 12; Raz, "Human Rights Without Foundations," 323–324; Valentini, "Human Rights, Freedom, and Political Authority," 594 n.9.

¹¹⁰ John Tasioulas, "The Moral Reality of Human Rights," in *Freedom from Poverty as a Human Right*, ed. Thomas Pogge (Oxford: Oxford University Press, 2007), 75–101. According to Buchanan, Tasioulas is "a vigorous defender of the Moral or Orthodox approach", Allen E. Buchanan, "The Egalitarianism of Human Rights," *Ethics* 120, no. 4 (2010): 12.

rights. Beitz acknowledges this point by saying that there is not an unambiguous target of naturalistic conception because i) the idea of natural rights has a long history and has changed over time, and ii) there are different interpretations of in what sense natural rights may be said to be ‘natural’.¹¹¹ Notwithstanding this ambiguity over what counts as a naturalistic human right theory, Griffin’s personhood or agency theory of human rights is generally considered to be a lucid account of the naturalistic conception of human rights in the literature.¹¹² Moreover, as I will discuss below, Griffin himself claims that his approach is naturalistic (in an expansive sense of ‘naturalism’ in his view). Although there are other accounts which can be considered as naturalistic, for the time being what is important for my analysis is the exemplification of an understanding of the nature of human rights conceived independently of the embodiment of human rights in international practice which is the main problem with naturalistic accounts according to defenders of the political conception.¹¹³

2.3.1 Alan Gewirth: Human action as the basis of human rights

In *Reason and Morality* and in a series of articles, Gewirth has presented a theory of the basis and content of human rights through a moral justification.¹¹⁴ He begins with a depiction of the concept of right proposing that the full structure of Hohfeld’s claim-right is given by the following formula:

A has a right to X against B by virtue of Y.

There are five main components here:

- I. The *Subject* (A) of the right, the person who has it,
- II. The *Nature* of the right, what being a right consists in,

¹¹¹ Beitz, *The Idea of Human Rights*, 51.

¹¹² I have not been able to find an exception to the categorization of Griffin’s theory as a naturalistic theory in the literature on the naturalistic versus political conception of human rights. All scholars cited in footnote 65 (except Jean L. Cohen who does not mention Griffin at all) consider Griffin’s theory as an example of the naturalistic conception (or ‘orthodox’, ‘traditional’ or ‘humanist’ conception depending on their own terminology). Less uncontroversial examples of the naturalistic conception are Amartya Sen, “Elements of a Theory of Human Rights,” *Philosophy & Public Affairs* 32, no. 4 (2004): 315–356 and Martha C. Nussbaum, “Capabilities and Human Rights,” *Fordham Law Review* 66, no. 273 (1997): 273–300; Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2003), 96–101. The theory of human rights as protections of ‘basic human capabilities’ proposed by Sen and Nussbaum are considered naturalistic theories by some scholars, Cf. Beitz, *The Idea of Human Rights*, 61–64; Gilibert, “Humanist and Political Perspectives on Human Rights,” 443; Valentini, “Human Rights, Freedom, and Political Authority,” 594 n.9.

¹¹³ See for instance Beitz, *The Idea of Human Rights*, 7,53 and Raz, “Human Rights Without Foundations,” 323.

¹¹⁴ Many of these articles have been collected in Gewirth, *Human Rights: Essays on Justification and Applications*. Other relevant articles are Alan Gewirth, “Why There Are Human Rights,” *Social Theory and Practice* 11, no. 2 (1985): 235–48; Alan Gewirth, “The Epistemology of Human Rights,” *Social Philosophy and Policy* 1, no. 2 (1984): 1–24.

- III. The *Object* (X) of the right, what a right is a right to,
- IV. The *Respondent* (B) of the right, the person or persons who have the correlative duty,
- V. The *Justifying Basis* or *Ground* (Y) of the right.¹¹⁵

When rights in question are human rights, Gewirth argues, both the subjects and respondents (elements I and IV) comprise all human beings equally; the objects (element III) are certain essential interests of human beings as prospective purposive agents; the nature of a right (element II) is an individual's interest that ought to be respected and protected; and the justifying basis (element IV) is a stringently rational supreme principle of morality.¹¹⁶

It is crucial to elucidate Gewirth's moral justification of human rights here as it will be illustrative of the taxonomy I give between different modes of justification in section 2.6. Gewirth starts by postulating that human rights are derived in essence from humanity's moral nature and that "agency or action is the common subject of all morality and practice."¹¹⁷ He proposes a formulation about the nature of human rights such that rights are "*personally oriented normatively necessary moral requirements*" and he goes on to provide moral reasons to justify or ground moral requirements that constitute the nature of human rights.¹¹⁸ He argues that the justification of our claims to basic rights is grounded in what he believes the distinguishing characteristic of human beings: the capacity for rational purposive agency. Freedom and well-being, the argument goes, are the necessary conditions for rationally purposive action. As they are prerequisites for purposive action, each individual is entitled to have access to freedom and well-being. Gewirth then moves from the idea that freedom and well-being are necessary conditions of her action to the requirement that she ought to recognize that other people also have rights to freedom and well-being. This requirement to recognize others as right bearers is due to what Gewirth calls the *principle of generic consistency (PGC)* expressed as: "[a]pply to your recipient the same generic features of action that you apply to yourself."¹¹⁹

Gewirth argues that an agent has to accept that other people as being prospective purposive agents also have rights. Otherwise, the agent will logically contradict herself and be irrational. An agent cannot logically will his/her own claims to basic rights without simultaneously

¹¹⁵ Gewirth confines himself to claim-rights in the Hohfeldian system and uses this terminology in discussing the various parts of human rights. The elements are capitalized for emphasis and recognition in the arguments.

¹¹⁶ Alan Gewirth, *The Community of Rights* (University Of Chicago Press, 1996), 9.

¹¹⁷ Gewirth, "Why There Are Human Rights," 235.

¹¹⁸ Gewirth, *Human Rights: Essays on Justification and Applications*, 2.

¹¹⁹ *Ibid.*, 123.

accepting the equal claims of rationally purposive agents to the same basic rights. “The argument for the PGC has”, Gewirth claims, “dialectically established that the human rights have as their objects the necessary conditions of action and successful action in general and that all humans equally have rights.”¹²⁰ In Gewirth’s justification of human rights the justifying basis or ground of human rights is a normative moral principle that serves to prove or establish that every human morally ought, as a matter of normative necessity, to have the necessary goods as things to which he is personally entitled, “which he can claim from others as his due.”¹²¹

Without being able to do justice to the rich account of human rights that Gewirth provides, I will briefly discuss in what sense Gewirth’s account can be considered as naturalistic. Gewirth, himself claims that his argument for human rights is not straightforwardly naturalistic in the sense that it does not proceed assertorically but rather dialectically. According to Gewirth, an assertoric argument for human rights is in the form, “someone is human or has some humanly related property, such as rationality or capacity for agency or various needs, therefore he or she has rights.”¹²² He rather provides what he calls a *dialectically necessary argument*. What he means is that “the argument has established not that persons have rights *tout court* but rather that all agents logically must claim or at least accept that they have certain rights.”¹²³ In other words, it is possible and indeed logically necessary to infer rights claims to objects which are the proximate necessary conditions of human agency or ‘human action’ as Gewirth prefers to name it.¹²⁴

Gewirth criticizes (Aristotelian) naturalistic foundations and offers an alternative moral theory which, he claims, may be construed as a theory of natural law with certain qualifications.¹²⁵ Gewirth’s moral theory is not ontologically grounded in the nature of the human—on what human beings essentially are—but rather on *human action*:

Now while human action is indeed a pervasive feature of the general human condition, human action reflects not human nature *per se* but rather a certain development of it, since it consists in man’s purposive or intentional control of his natural tendencies. Thus human nature is the *necessary* condition of human action, but not its *sufficient* condition. At the same time the concept of human action is morally neutral and hence not question-begging in

¹²⁰ Gewirth, *The Community of Rights*, 19.

¹²¹ Gewirth, *Human Rights: Essays on Justification and Applications*, 2.

¹²² Gewirth, “Why There Are Human Rights,” 235.

¹²³ Gewirth, *Human Rights: Essays on Justification and Applications*, 54.

¹²⁴ See *Ibid.*, 41.

¹²⁵ Alan Gewirth, “The Ontological Basis of Natural Law: A Critique and an Alternative,” *American Journal of Jurisprudence* 29, no. 1 (1984): 95.

the present context, because a concern with how persons are to *act* is common to all moralities, regardless of their highly divergent contents.¹²⁶

Therefore, Gewirth acknowledges that his moral principle of generic consistency (PGC) shares with natural law theories the characteristics of what he calls *ontological groundedness* (being based on essential features of the nature of the human) but only in the modified form since the generic features of action do not derive from man's nature *per se* but from a certain purposive development of it.¹²⁷ According to Gewirth "[t]he metaphysical level is provided by the concept of the human action as the ontological and justificatory context of the principle of human rights."¹²⁸ Hence, unlike Griffin whose justification I will discuss in the next section, Gewirth does not provide an ethical justification dependent on a particular notion of the good. Nevertheless he does not aim to offer a post-metaphysical justification, nor does he deny the need for a justification of human rights.¹²⁹ Moreover, for Gewirth human rights are moral rights and the content of human rights is derived from the application of PGC to different contexts and problems. He provides a justification of human rights by simply arguing that they are prerequisites of the purposive agency of individuals and without reference to their embodiment or role in any public doctrine or practice. Hence to the extent that he perceives human rights to be primarily moral rights without referring to their legal character and embodiment in international law, Gewirth's account resembles the naturalistic conception of human rights.¹³⁰ I will now move to the examination of the theory of human rights proposed by Griffin, which is often considered to be one of the most canonical contemporary examples of a naturalistic conception of human rights.

¹²⁶ Ibid., 118, emphasis added.

¹²⁷ Ibid., 119. According to Gewirth ontological groundedness is one of the definitive features of the Aristotelian-Thomist doctrine of natural law according to which natural law requires the protection and promotion of goods or interests that are based on the very nature of human beings. The requirements of natural law are not imposed on humans from sources outside their own essential natures such as from a transcendental position or from ethical relativist positions that try to base moral precepts on variable desires, emotions, or social institutions. On the contrary, those requirements simply reflect and promote goods or interests that are inherent in fundamental tendencies and strivings of human nature as such. Ibid., 96.

¹²⁸ Gewirth, *The Community of Rights*, xiv.

¹²⁹ Gewirth briefly refers to Richard Rorty's rejection of the very idea of justification as "outmoded and irrelevant." He claims that the alternative to these proposals to summarize our culturally influenced intuitions rather than trying to give a justification incurs difficulties as intuitions vary from group to group. Ibid., 10–11. I will examine the skepticism about the very idea of justification in section 2.6.

¹³⁰ This may be the reason why Raz, one of the prominent supporters of the political conception, considers Gewirth's account as naturalistic. Another important aspect of Gewirth's account is that Gewirth perceiving human rights as moral rights argues that all people are duty-bearers of human rights. The defenders of the political conception, on the other hand, argue that the main duty-bearers of human rights are institutions, especially one's state.

2.3.2 James Griffin: Normative agency as the ground of human rights

James Griffin's account of human rights has been considered one of the most prominent contemporary versions of the naturalistic conception of human rights.¹³¹ In his most recent book *On Human Rights*, he suggests that "human rights can be seen as protections of our human standing, or personhood."¹³²

Griffin starts with complaining about a state of "indeterminateness of sense" about the term 'human rights'. He argues that when the theological content of the term was abandoned during the seventeenth and eighteenth century, the term was left with very few criteria for determining the correct and incorrect use of the term. As a result of this indeterminateness of sense, Griffin believes, the language of human rights has become "debased."¹³³ This is because in our time there is a proliferation of rights or in Griffin's words "a growth of the extension of the term."¹³⁴ The idea of human rights plays an increasingly central role in contemporary moral and political life. This growth of the extension of the term makes the understanding of its intension more important whereas it remains especially thin.

In order to remedy this indeterminateness of sense, Griffin aims to "add to the evaluative content of the term."¹³⁵ According to Griffin, there has not been much theoretical development of the idea of human rights since its emergence by the end of the Enlightenment. Without doubt, there have been some sort of (institutional) developments such as the development of the League of Nations, treaties and basic mechanisms for the international protection of human rights but "none has been added to the idea itself. The idea is still that of a right we have simply in virtue of being human, with no further explanation of what 'human'

¹³¹ Some writers who considers Griffin's account as naturalistic are Liao and Etinson, "Political and Naturalistic Conceptions of Human Rights"; Gilabert, "Humanist and Political Perspectives on Human Rights"; Beitz, *The Idea of Human Rights*; Raz, "Human Rights Without Foundations"; Forst, "The Justification of Human Rights"; Buchanan, *The Heart of Human Rights*. Gilabert argues that Griffin is one of the contemporary defenders of what he calls 'the humanist perspective' on human rights, Gilabert, "Humanist and Political Perspectives on Human Rights," 461, whereas Forst argues that Griffin provides primarily an ethical justification of human rights without calling it a naturalistic account, Forst, "The Justification of Human Rights," 713.

¹³² Griffin, *On Human Rights*, 33.

¹³³ Ibid., 15.

¹³⁴ Ibid., 17. Although Griffin does not clearly articulate how he uses the extension/intension distinction applied to the notion of human rights, he makes a brief comment on the issue: "there is an Enlightenment notion of human rights, that it has an element of intension—namely, that a human right is a right that we have simply in virtue of being human—and an extension—roughly, the rights found in the United States Bill of Rights, in the French Declaration of the Rights of Man, and in certain key United Nations instruments", Ibid., 16. He gives the right to periodic holidays with pay in the Universal Declaration of Human Rights of 1948 (Article 24) as an example of the growth of the extension of human rights. Griffin further explains that when he says there is an indeterminateness of sense about the term human rights, he means that the intension is thin and what is required is not a definition but rather an explanation of the term.

¹³⁵ Ibid., 5.

means here.”¹³⁶ He argues that there is a common agreement that human rights are derived from ‘human standing’ or ‘human nature’, but virtually no agreement about the relevant sense of these two supposedly criteria-providing terms.¹³⁷ He aims to provide an account of human rights which has some criteria to tell us whether any such proposed right really is one and which, as such, makes a (philosophical) contribution towards the completion of the incomplete idea of human rights.¹³⁸

Before developing his own account, Griffin makes two classifications of different approaches to explaining rights: 1) a distinction between ‘substantive’ and ‘structural’ accounts and 2) a distinction between ‘top-down’ and ‘bottom-up’ accounts.¹³⁹ Structural accounts characterize rights largely by their formal features. Joel Feinberg’s account of rights, which says that a right is a claim with two features, is a highly structural one. The first feature is that a right is a claim against specifiable individuals and second, it is a claim to their actions or omissions on one’s behalf.¹⁴⁰ Dworkin’s view that ‘rights are trumps’ is another highly structural account.¹⁴¹ But according to Griffin, an account of human rights must have more substantive evaluative elements than those supplied by any of the predominantly structural accounts we now have.¹⁴² For instance, we need to know how to attach moral weight to both rights and to different levels of the general good as well as a sketch of the highly vague term ‘human dignity’, especially in its role as a ground for human rights.¹⁴³

According to Griffin there are generally two ways for philosophy to supply a more substantive account of human rights. This brings us to Griffin’s second distinction between top-down and bottom-up approaches. In his words:

There is a top-down approach: one starts with an overarching principle, or principles, or an authoritative decision procedure—say, the principle of utility or the Categorical Imperative or the model of parties to a contract reaching agreement—from which human rights can then be derived. Most accounts of rights in philosophy these days are top-down. Then there is a

¹³⁶ Ibid., 13.

¹³⁷ Ibid., 16.

¹³⁸ Griffin also calls these criteria the “existence conditions” for a human right, a term which he borrowed from Sumner whose reconstruction of human rights I have analyzed in the previous section. Sumner, *The Moral Foundation of Rights*, 10–11.

¹³⁹ Griffin, *On Human Rights*, 20–30.

¹⁴⁰ Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980).

¹⁴¹ Dworkin, *Taking Rights Seriously*.

¹⁴² According to Griffin although in *Anarchy, State, and Utopia* (New York: Basic Books, 1974) Nozick’s account of rights as ‘side constraints’ has more ethical content than Dworkin’s (i.e. Nozick introduces an element of ethical substance, namely that rights represent the moral significance of the separateness of persons), it is still largely structural. Griffin also refers to the Rawls’s stipulation that we should avoid grounding human rights in substantive values and argues that Rawls’s stipulation should not leave us any less interested in developing an ethically substantive account by grounding human rights directly in values. I will say more on Rawls’ stipulation later in section 2.5.1.

¹⁴³ Griffin, *On Human Rights*, 21.

bottom-up approach: one starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them.¹⁴⁴

After indicating that both approaches should be welcomed and that they can be compatible, Griffin states that he has adopted the bottom-up approach. Starting not from an *a priori* commitment to an off-the-shelf general moral theory but from the history of the idea of a right in the human rights tradition that originates in the late medieval period, Griffin proposes a substantive account in the spirit of that tradition. The basic theme running through this tradition and about which Griffin thinks there is no harm in continuing to speak is our sense of “a distinctively ‘human’ existence.”¹⁴⁵ Here Griffin makes the assertion that we value our status as human beings highly and that human rights can be seen as protections of our human standing. For him, our distinctively human existence centers on our being agents or as he calls it, ‘our personhood’. Griffin identifies personhood with “normative agency” which he describes as having three parts:

[O]ne can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s own path through life—that is, not be dominated or controlled by someone or something else (call it ‘autonomy’). And (second) one’s choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this ‘minimum provision’). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected.¹⁴⁶

As is clear from the last sentence in the above paragraph, Griffin’s intuitive idea is that because we regard the exercise of our personhood as having especially high value, we see its domain as privileged and in need of protection. And, the substance and content of human rights are to be grasped in terms of their strategic role in protecting our personhood or our normative agency which is a precondition for “deliberating, assessing, choosing and acting to

¹⁴⁴ Ibid., 29. In his response published in the “Symposium on James Griffin’s *On Human Rights*” issue of *Ethics*, Griffin makes yet another distinction between ‘systematic’ and ‘piecemeal’ approaches. However this later distinction seems to overlap with the distinction between top-down and bottom-up approaches in the book: ‘systematic’ corresponds to top-down and ‘piecemeal’ corresponds to bottom-up approaches. In the systematic approach one starts by “developing a general theory of value, then one develops a theory of ethics in general, then a theory of rights in general, followed by theories of legal rights and moral rights, and finally a theory of human rights, either moral or legal.” In the piecemeal approach one starts with a particular notion of human rights (for instance the notion that emerged from the long tradition of natural rights/ human rights which is modified substantially over the course of time and still widely in use in political life and ethics) and then one explores how this notion of human rights figures in the best overall ethics one can devise, James Griffin, “Human Rights: Questions of Aim and Approach,” *Ethics* 120, no. 4 (2010): 741–742.

¹⁴⁵ Griffin, *On Human Rights*, 32.

¹⁴⁶ Ibid., 33.

make what we see as a good life for ourselves.”¹⁴⁷ The gist of Griffin’s argument is that we should primarily ground human rights in personhood. And we can generate most of the conventional list of human rights from this ground. However, Griffin argues that personhood cannot be the only ground needed for human rights, because it leaves many human rights too indeterminate. We also need to take into account practical considerations, what Griffin calls ‘practicalities’ to make the content of the right determinate enough. Griffin uses the term ‘practicalities’ to refer to “features of human nature and of the nature of human societies.”¹⁴⁸ Hence, Griffin states:

I propose, therefore, only two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One establishes the existence of such a right by showing, first, that it protects an essential feature of human standing and, second, that its determinate content results from the sorts of practical considerations.¹⁴⁹

In what sense is Griffin’s account naturalistic? Here, Griffin explains that his account is not based on a conception of human nature if one upholds a narrow conception of nature which excludes value. Griffin does not make a species argument which claims that having the factual properties of *homo sapiens* is constitutive of having a distinct human existence. Rights are not derived from something objective and factual about human beings. Hence, Griffin claims his account is not naturalistic in this sense of the term ‘natural’. Neither does he claim that rights are derived from value judgments which are a matter of taste. He claims that the right position is a kind of naturalism, but an expansive (not a reductive) one.

In the usual kind of reductive naturalism the boundaries of the ‘factual’ and ‘natural’ are kept relatively tight. Such forms of naturalism are influenced by David Hume’s view that values cannot be derived from facts. Griffin mentions that Hume’s dichotomy of fact and value depends upon his narrow conception of fact. Griffin, subsequently, claims that the most plausible interpretation of ‘nature’ is an expansive one rather than the narrow interpretation of Hume. In an expansive naturalism, the boundaries of ‘natural’ or ‘factual’ are pushed outward so that they now encompass human interests and also events such as these interests being met or unmet. Griffin singles out *values* of personhood via notions of autonomy and liberty as being especially important ‘human interests’. And rights are derived from these interests: they are interests, hence they are especially important and therefore need protection. Griffin

¹⁴⁷ Ibid., 32.

¹⁴⁸ Ibid., 38.

¹⁴⁹ Ibid., 44. Although Griffin labels practicalities as ‘a second ground’, it is a matter of discussion how much normative work this second ground does. The main normative work of delineating the interests and values that require the protection of rights are done by the normative agency whereas practicalities come into play for considerations of the specification of the objects of rights and feasibility conditions.

claims, in this sense, that he draws the notions of human nature and human agency inside the normative circle. This is not in line with a narrow understanding of ‘nature’ (the kind of reductive naturalism), but is in line with an “expansive naturalism.”¹⁵⁰

Hence, in Griffin’s account the criterion for assigning rights to some group of people is their having normative agency.¹⁵¹ The underlying model of rights in this account resembles more the choice model than interest model of rights, as the normative anchor is set on the notions of personhood and agency rather than the interests of the human individual.¹⁵² So, if we reconstruct the conditions developed in the earlier section, in Griffin’s account: 1) a model of rights as protected choices (as the protection of individual autonomy) is employed, 2) it assigns some set of rights to some set of individuals on the basis of their having normative agency, and (2.a) treats normative agency as natural in the sense of an expansive naturalism.

What about the justification of those rights in Griffin’s account? How are the rights derived and what is their place in moral theory? The steps in Griffin’s justification can be briefly summarized as such:

- i) The human rights tradition including the linguistic community of “philosophers, political theorists, international lawyers, jurisprudents, civil servants, politicians, and human rights activists” furnishes us with the idea that human rights are grounded in our *status* as human beings.¹⁵³
- ii) Human *dignity* is identified as the valuable *status* protected by human rights.

¹⁵⁰ Ibid., 35–36, 123–124. By ‘expansive’ Griffin means that this kind of ‘ethical naturalism’ which includes basic human interests and cases of their being met or unmet as natural facts. In Griffin’s words: “What I propose is that whether certain human interests are met is also a matter of fact. It is *also* a matter of value”, Ibid., 123. Griffin considers the basic human interest to avoid pain to demonstrate this: When I am in pain, it is a matter of fact. The experiences of pain have both a phenomenological side (the internal feel of our experiences of pain), and, equally important, an active side (reactions of avoidance, alleviation, and so on). According to Griffin, to understand pain already involves regarding it as a disvalue. For more on Griffin’s expansive naturalism, see James Griffin, *Value Judgement: Improving Our Ethical Beliefs* (Oxford: Clarendon Press, 1996), chap. 2–4; Griffin, *On Human Rights*, sec. 6.1–6.2.

¹⁵¹ In Griffin’s words; “[f]rom time to time in the course of the history one encounters the idea that human rights are protections of our human status and that the human status in question is our rational or, more specifically, normative agency. In my attempt to make the sense of the term ‘human rights’ more determinate, I suggest that we adopt this part of the tradition, that we see human rights as protections of our normative agency” Ibid., 2. Therefore human infants, the severely mentally disabled, comatose adults, future generations, etc. do not have human rights in Griffin’s account because they are not normative agents. He argues that we have moral obligations towards them and these obligations are not correlative to a human right. See Ibid., chap. 4.

¹⁵² Yet, there is also a strong case to claim that Griffin has a notion of rights which blends interest and choice models of rights, because in his discussion of “the metaphysics of human rights”, he starts from a position of expansive naturalism of taking interests into the factual world, but then he singles out the interests that are the components of personhood as being most immediately relevant to human rights.

¹⁵³ Griffin, “Human Rights: Questions of Aim and Approach,” 749.

- iii) At the core of human dignity is our normative agency—“our capacity to reflect on, to choose and to pursue what we ourselves decide is a good life.”¹⁵⁴
- iv) Normative agents have values of personhood (autonomy, liberty, minimum provision).
- v) Since human rights protect our status as normative agents, they protect these values of personhood.
- vi) Human rights norms arise from this importance attached to values of personhood and the requirements of practicality.

Griffin’s justification of human rights is not ‘foundationalist’ in a highly ambitious sense. Ambitiously foundationalist views have the ambition of showing that a schedule of human rights can be derived from a conception of human nature that is both historically invariant and contains no evaluative content.¹⁵⁵ Rather than being foundationalist in this sense of grounding ethical thinking on objective facts about human nature, Griffin’s ethical justification derives human rights norms from the double criteria of values of personhood and requirements of practicality. The values of personhood underlying the human rights norms are “interests that are central to normally functioning human agency”; hence the notion of ‘human’ invoked by Griffin’s theory is a “normatively loaded one.”¹⁵⁶

Although not foundationalist in the strict sense, Griffin’s theory is a substantive theory of human rights. In contrast to those views which claim that there is no need for justification of human rights (see section 2.6), Griffin is concerned to set the conditions that need to be met for a norm to be a human right. His account is substantive in a further way that he grounds human rights in human goods, particularly the goods of personhood. As such, Griffin’s justification is one of *ethical* justification in which a substantive notion of the good grounds human rights. *Deontological* justifications on the other hand, justify human rights without making reference to a substantive notion of good but rather to a moral principle or rule.¹⁵⁷

¹⁵⁴ James Griffin, “First Steps in an Account of Human Rights,” *European Journal of Philosophy* 9, no. 3 (2001): 319.

¹⁵⁵ When I use the phrase ‘foundationalism in a highly ambitious sense’, I am referring to Tasioulas’s characterization of Rorty’s position with respect to the justification of human rights. Tasioulas claims that Rorty has a stringent understanding of justification of human rights in a foundationalist sense. Justification of human rights, in an ambitiously foundationalist view, is to designate a historically invariant conception of human nature which contains no evaluative content as the foundation of the idea of human rights. “Such a conception would furnish premises capable of being known to be true independently of the truth of the moral judgments that are to be deduced from them or indeed any other evaluative judgment”, John Tasioulas, “Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps,” *European Journal of Philosophy* 10, no. 1 (April 2002): 81. I will discuss Rorty’s anti-foundationalist position with respect to the justification of human rights in section 2.6.

¹⁵⁶ Ibid.

¹⁵⁷ Deontological justifications also differ from justifications of a consequentialist manner which justifies an act or rule with reference to their good consequences. I do not go into a discussion of consequentialism here.

Analysing Griffin's view, Rainer Forst provides a criticism of the *ethical* justifications of human rights. Using a distinction between morality and ethics as developed by Habermas and Dworkin, Forst argues that "a conception of human rights needs to have independent and sufficient moral substance and justification, though not one of an ethical kind that relies on a conception of the good. In the context at hand, an ethical justification rests on a notion of the good life, even if it is a very general one, while a moral justification is supposed to be neutral as to the question of the good or worthwhile life."¹⁵⁸

Griffin derives human rights from a basic interest in pursuing the good. Certain subjective interests are considered to be fundamental for normative agency and they are turned into intersubjectively justifiable claims for rights. Normative agency understood as our capacity to "choose and to pursue our conceptions of a worthwhile life" stands at the center of Griffin's view.¹⁵⁹ So even though Griffin does not attach human rights to any particular notion of the good, the autonomy or the capacity of choosing what we see as a good life for ourselves, or being "self-deciders" about our good life is the core of our human status. On this view, the good life can only be called as such, if it is autonomously chosen and pursued. This is a reasonable belief, Forst says, but it is a belief "which might also be doubted by someone who believes the good to consist in following a higher calling or in one's duties as a member of a particular community in a traditional sense."¹⁶⁰ Hence, Griffin has a partial, non-universalizable conception of the good and such a conception cannot ground universal human rights.

Moreover, even if we grant the claim that autonomy is an essential condition of the pursuit of the good, the moral weight of a general duty to respect others as autonomous agents does not follow without an additional moral consideration. Forst argues that to shift from a personal prudence perspective to general morality, "a procedure of intersubjective

¹⁵⁸ Forst, "The Justification of Human Rights," 718–719. Although I cannot go into the details of the distinction between morality and ethics here it is important to note that the distinction expresses mainly the idea of an *autonomous* morality of unconditionally binding norms (e.g. Kant's categorical imperative) which is autonomous from ethical doctrines and comprehensive worldviews (for more detail see, Jürgen Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification," in *Moral Consciousness and Communicative Action* (Cambridge, Mass.: MIT Press, 1990), 43–115; Forst, *The Right to Justification*; Ronald Dworkin, "Foundations of Liberal Equality," in *Tanner Lectures on Human Values XI*, ed. Grethe B. Peterson (Salt Lake City: University of Utah Press, 1990), 1–119. The implication of this difference for human rights is that human rights understood as universally binding moral norms require moral, not ethical, justification. The criticism of an ethical justification of human rights also echoes Rawls's concern about "ordinary moral reasoning" which I will discuss in section 2.5.1. I will summarize what I call different *modes* of justifications in section 2.6.

¹⁵⁹ Griffin, *On Human Rights*, 25.

¹⁶⁰ Forst, "The Justification of Human Rights," 723.

justification seems to be necessary as the main generator of normativity.”¹⁶¹ Griffin does not give such an intersubjective justification; the explication of the translation of the first-person subjective interests (of a prudential ethical value for *me*) to general moral rights (to a moral reason for *all*) is missing in his account.

Griffin’s account of human rights is occasionally cited as a contemporary version of the naturalistic conception of human rights and it is criticized for reasons which I have briefly discussed. Another kind of objection to the personhood account of Griffin is provided by John Tasioulas. He criticizes Griffin’s account not because it is naturalistic or it has an ethical justification, but because it grounds human rights only in personhood. I will explicate this line of criticism in the next section.¹⁶²

2.3.3 John Tasioulas: Pluralistic grounding of human rights

John Tasioulas recommends the adoption of a systematic approach to human rights.¹⁶³ In Griffin’s formulation a systematic approach starts by developing a theory of values, then a theory of ethics in general, then a theory of rights in general, followed by theories of legal rights and moral rights, and finally a theory of human rights, either moral or legal.¹⁶⁴

Tasioulas adopts a less ambitious version of the systematic approach which Griffin calls a “semi systematic approach.”¹⁶⁵

Instead of starting from a theory of value in general, Tasioulas starts from a theory of moral obligation within which moral rights and human rights are situated. He states that he does not have an ambitious aim of giving a definition of a moral right. Neither does he insist that one should take sides in the long-standing controversy between the proponents of ‘interest’ and ‘will’ theories of rights. Instead he elaborates on three important features of moral rights relevant for a conception of human rights. These features are: 1) moral rights are sources of moral duties or obligations. Moral duties are categorical (i.e. apply to an agent regardless of the agent’s motivation) and exclusionary (i.e. they exclude some of the competing reasons from bearing on what the duty-bearer should do) in their normative force, 2) individual moral rights are grounded in some normatively salient feature of the individual right holder (e.g. in the interests or normative status of the right holder) and 3) moral rights

¹⁶¹ Ibid., 722.

¹⁶² Tasioulas, “Human Rights, Universality and the Values of Personhood”; Tasioulas, “Taking Rights out of Human Rights.”

¹⁶³ Tasioulas, “Human Rights, Universality and the Values of Personhood”; Tasioulas, “Taking Rights out of Human Rights.”

¹⁶⁴ Griffin, “Human Rights: Questions of Aim and Approach,” 741.

¹⁶⁵ Ibid., 746.

have a directed character in the sense that they are held by identifiable individuals.¹⁶⁶ This threefold characterization of moral rights, Tasioulas argues, begins to explain why human rights properly qualify as individual moral rights, as opposed to interests, values, claims, goals or moral considerations of some other kind.¹⁶⁷

Taking Griffin's account as his focus, Tasioulas argues that personhood values alone are inadequate for grounding human rights. Instead, Tasioulas proposes a pluralist account of human rights such that prudential values other than values of personhood can give rise to rights all individuals have in virtue of being a human being. He suggests that it is not implausible to think that other values such as the value of accomplishments, the basic interest of avoiding pain and the value of understanding may contribute to the justification of the human rights to work, not to be tortured and to education respectively. Tasioulas argues that Griffin's personhood account provides an implausibly indirect justification of the paradigmatic human rights. For instance, Griffin provides an indirect justification of one paradigmatic human right, the right not to be tortured, by its adverse impact on our personhood by "render[ing] us unable to decide for ourselves or to stick to our decision."¹⁶⁸ On the other hand, a pluralist account might make a more intuitively plausible justification of the right not to be tortured by resting it directly in the victim's interest in avoiding severe pain and suffering.

In addition to "a more natural and secure style of justification for paradigmatic human rights", Tasioulas suggests two further advantages of the pluralistic grounding of human rights.¹⁶⁹ First, for the reason that a pluralist account expands the range of interests that ground human rights it augments more effectively the idea that human rights are moral norms of substantial normative force. Second, "a pluralistic grounding of human rights enhances the prospects of justifying the applicability of human rights to cultures which do not place such a high value on autonomy and liberty as Western cultures."¹⁷⁰ By not grounding human rights exclusively on personhood values, pluralist accounts are better equipped to respond to the recurrent objection of "parochialism" or "ethnocentrism."¹⁷¹ In short, starting from a criticism of Griffin's grounding of human rights exclusively on personhood values; Tasioulas defends an account of human rights as a subset of moral rights although "rudimentary and

¹⁶⁶ Tasioulas, "Taking Rights out of Human Rights," 656–657.

¹⁶⁷ One main criticism of Griffin's personhood account by Tasioulas is along these lines. He argues that it is a shortcoming of Griffin's theory that he does not give an account of the general nature of moral rights and how they differ as *rights* from interests, values, goods and so on. Ibid., 650–652.

¹⁶⁸ Griffin, *On Human Rights*, 52.

¹⁶⁹ Tasioulas, "Taking Rights out of Human Rights," 663.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

incomplete.”¹⁷² As grounding human rights in a plurality of substantive goods, Tasioulas’ pluralist account is subject to some of the general criticism directed to the naturalistic conception in general which I will examine in section 2.5.

2.4 Are there a human right to work and a human right to housing?

In this section, I will examine the implications of the naturalistic conception’s general perspective on human rights for an evaluation of the claims that there is a human right to work and a human right to adequate housing. Before starting, it is important to emphasize that the right to work (it is also called the right to employment) is not the only norm in the area of work; there are other related rights and goals such as the right to free choice of employment, the right to unemployment benefits during unemployment, an entitlement to decent working conditions and to fair remuneration, etc.¹⁷³

The naturalistic conception of human rights starts from a ground (or multiple grounds) in order to develop a conception of human rights. First, a basis or ground which delineates the important features of human beings is identified. This basis subsequently leads to a list of human rights.¹⁷⁴ For instance, Gewirth devotes the last two chapters of *Reason and Morality* to what he calls ‘direct’ and ‘indirect’ applications of his moral principle of generic consistency (PGC). Direct applications concern interpersonal actions of particular individuals such as the resolution of ethical dilemmas in which individuals’ rights to freedom and well-being clash in some way with another person’s well-being. Indirect application of the PGC concerns social rules and institutions. Here Gewirth discusses the kinds of social rules that should shape voluntary associations among people, government, civil liberties and society’s effort to meet social and welfare needs of its members. Gewirth’s 1996 book *Community of Rights*, is a sequel to *Reason and Morality*, especially with regard to the indirect applications of the PGC. In this book, he expands on the indirect applications to social and economic rights as he states that this book can be regarded as “an attempt to give a philosophical

¹⁷² Ibid., 658.

¹⁷³ All these rights are, in a nutshell, referred to as ‘labor rights’ in the literature. The rights other than right to work are also frequently mentioned in the same paragraph of rights documents. For instance Article 23 of UNDHR lists human rights related to work as such: (1) everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his interests.

¹⁷⁴ Risse places another component between the basis and the list of human rights. In his analysis, a basis-driven conception leads to a *principle* that generates the list of human rights and this principle in turn generates the list. Risse, “A Right to Work? A Right to Leisure?,” 17. One can argue, along these lines, that action as the *basis* of morality in Gewirth’s account leads to the *principle* of generic consistency.

elucidation and specification of some of the main economic and social rights set forth in the Universal Declaration of human rights by showing how they can be derived, by various modes of argument from a single rationally justified moral principle that serves to ground their more specific contents.”¹⁷⁵

The right to employment is one of the cornerstones of Gewirth’s community of rights which he derives from the principle of generic consistency. Gewirth offers an elaborate set of arguments concerning the right to employment, the state’s obligation to provide employment opportunities, and the state’s obligation to minimize opportunities for employers to exploit workers for personal profit.¹⁷⁶ Without being able to go into the details of Gewirth’s arguments, what is important for me is that he argues in favor of a moral right to employment because of its crucial impact on well-being and freedom.

In a similar manner, after developing his personhood account of human rights, Griffin describes the three highest-level rights: to autonomy, liberty and minimum provision.¹⁷⁷ In a next stage, he reflects on the discrepancies between the lower-level human rights that emerge from his philosophical account and the lists derived from the most authoritative declarations in international law. Griffin checks the items in the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economics, Social and Cultural Rights (1966) to identify the *acceptable*, *unacceptable* and *debatable* items in these documents seen through the lens of his personhood account.

Here, I will briefly examine the implications of Griffin’s account for the specific rights claims I have focused on in the previous chapter: the right to work and the right to housing. With respect to the former, Griffin explicitly states that on his account, there is not a human right to work.¹⁷⁸ He argues that there is certainly a human right to the minimum resources needed to live as a normative agent, but those resources do not need to come from work. Since work is one of the most effective means to have access to these material resources, it is plausible to think that we have a right to work. But according to Griffin, the right to work enlisted in the human rights documents is the application of an abstract universal right to adequate material provision required for agency and “to options to live in productive, interesting and enjoyable way” in a particular time and place.¹⁷⁹ This universal form of abstract right applied to current societies is formulated as a right to work; we value work in

¹⁷⁵ Gewirth, *The Community of Rights*, xiii.

¹⁷⁶ *Ibid.*, chap. 5–6.

¹⁷⁷ Griffin, *On Human Rights*, 149–187.

¹⁷⁸ *Ibid.*, 207–208; James Griffin, “Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights,” *Proceedings of the Aristotelian Society* 101 (2001): 24–25.

¹⁷⁹ Griffin, *On Human Rights*, 208.

our societies as it is the most effective means to having adequate material provision and it enhances one's feeling of self-worth as being productive and contributing to society. Yet, Griffin argues, if in an advanced technological society there would not be enough work for everyone, and those without work are equally provided with resources needed to live as an agent, we cannot say that the human rights of the unemployed are violated. For this reason, Griffin classifies the right to work as an *unacceptable* item in the human rights documents.

For Griffin, there is a human right to the minimum resources to live as an agent, which would typically, but not necessarily, be secured through work. However, as Tasioulas argues this seems too quick and problematic on two counts. First, the fact that we can conceive of a society in which work is not the necessary means to securing the minimum resources needed for agency does not mean that it cannot be a human right. We can similarly envisage a world order in which the national borders and state sovereignty are abolished but this does not diminish the case that there is a right to nationality now—which is recognized as a human right in Griffin's account.¹⁸⁰ Second, Tasioulas argues that there can be grounds other than personhood such as self-respect and personal accomplishments that justify a right to work. A non-personhood value such as the universal interest in accomplishment can be invoked to justify a human right to work, in the following way:

(1) [T]here is a universal interest in accomplishment and one particularly central way in which it can be satisfied is through engaging in productive and remunerative activity, (2) this interest is closely related to the sense of our dignity as adult human beings; in particular, to our capacity for full, rather than second-class, status in our communities, and (3) that interest (together with any other relevant interests realized through productive employment, such as enjoyment, autonomy and so on) is sufficiently important to justify the existence of a right to work possessed by all humans, one that imposes duties on others (primarily on state institutions, perhaps) to create decent work opportunities, and (4) the existence of such a right is not vitiated by considerations of practical feasibility.¹⁸¹

Therefore, one can argue that there is a moral meaning of work that is independent of its value as a means of securing an adequate level of material provision. From this moral meaning one can justify the existence of a right to work which gives room to arguments about how the correlative duties are assigned. For instance it can be objected that a human right is violated if a state prohibits some group of people from holding jobs (i.e. women, religious minorities etc.) even though they are granted minimum material provision. There can be correlative duties of this right in the sense such that states make sure that people are not systematically excluded from employment, or in the stronger sense that the government can become the employer of last resort. These are further considerations about the duties associated with the

¹⁸⁰ Ibid., 202.; Tasioulas, "Human Rights, Universality and the Values of Personhood," 89–90.

¹⁸¹ Ibid., 91–92.

right to work if there is such a right and how this right is given institutional expression (e.g. implementing mechanisms for compensating those deprived of work or for apportioning available work among people who wish to work, etc.) —to which I will turn to in the next chapter. At this point, it is sufficient to say that the route the naturalistic conception takes is first delineating the ground (or grounds) of human rights and then from this ground developing the list of human rights.

The implications of the naturalistic conception with respect to the right to housing is less direct than the case of the right to work because there is not much explicit discussion about the right to housing in the literature. If we conceive the right to adequate housing as part of the minimum provision necessary to support life as a normative agent, we can say that Griffin's personhood account generates a positive right to housing. As Griffin states, what is needed to function as a normative agent will be "air, food, water, shelter, rest, health, companionship, education and so on."¹⁸² It is now common to acknowledge that welfare rights and liberty rights are indivisible in the sense that one needs to be alive and have supporting goods in order to be free and autonomous agents. Even the most parsimonious accounts of human rights recognize welfare rights as being basic rights for securing basic needs. Nevertheless, there can be different arguments for a human right to welfare such as welfare for effective citizenship in a modern liberal democracy¹⁸³ or Griffin's argument that there is a human right to welfare as necessary conditions of normative agency.

However, recall that the people in the struggles claim a right to housing and the broader 'right to the city' as a response to their being forced to leave their neighborhoods due to the implementation of urban transformation projects. If this claim is associated with freedom of residence (Article 13.1 of Universal Declaration), the implications for Griffin's account are less trivial than the conception of the right to housing within welfare rights. This is because, according to Griffin, there is not a human right to residence as soon as the basic amenities (a decent education system, adequate material provision, so on) are provided. "One's personhood would not be threatened if one were required to live in a particular place, so long as the basic amenities are provided."¹⁸⁴ According to Griffin's understanding the people in squatter houses may have a preference for living in the city center and the places in which

¹⁸² Griffin, *On Human Rights*, 88.

¹⁸³ See e.g. Robert E. Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton: Princeton University Press, 1988); Desmond S. King and Jeremy Waldron, "Citizenship, Social Citizenship and the Defence of Welfare Provision," *British Journal of Political Science* 18, no. 4 (1988): 415–93.

¹⁸⁴ Griffin, *On Human Rights*, 195.

they are already settled, but it is not the case that the policy relocating these people violates a human right as long as the basic amenities in the designated living spaces are provided.

This brief reflection on the application of the naturalistic conception to the specific rights to housing and work does not aim to give a definite answer to the question: Are there human rights to housing and work according to the naturalistic conception? This reflection rather exposes that the route taken by the naturalistic conception is to first develop a philosophical account of human rights with ground, justification and content of human rights and then compare it with the main human rights documents. Different versions of the naturalistic conception can arrive at different lists of human rights and as we have seen with respect to the right to work, the same right can be denied as a human right by one account (i.e. Griffin's personhood account) whereas it is accepted as a human right by another version of the naturalistic conception (i.e. Gewirth's agency account or Tasioulas's pluralist account). From a very similar basis such as human agency, Gewirth and Griffin derive very divergent sets of rights and with a different mode of justification. I will examine these different modes of justification in section 2.6 but before that I would like to review some of the most common objections to the naturalistic conception of human rights.

2.5 Objections to the naturalistic conception of human rights

One can find the objections raised against the idea of natural rights from the very beginning of the discussion of natural rights of the human individual in the moral and political philosophies of Thomas Hobbes, John Locke and Thomas Paine. The first critics of the idea of inalienable natural rights were Edmund Burke and Jeremy Bentham. They claimed that rights arise out of laws, from the actions of government or evolve from tradition. Bentham famously dismissed the idea of natural rights as “nonsense upon stilts” as he states: “right with me is the child of law... a natural right is a son that never had a father.”¹⁸⁵ It is possible to divide the reasons of Bentham's opposition to natural rights into two broad categories: the conceptual and the substantive. The assertion of such rights, he claims, is absurd in logic and pernicious in morals.¹⁸⁶ The conceptual criticism is that the idea of natural rights is a logical absurdity, a contradiction in terms. His argument, as Sumner reconstructs it, is as follows: “(1) there can be no rights without rules (laws); (2) there can be no natural moral rules (laws); (3) there can

¹⁸⁵ Jeremy Bentham, “Supply without Burthen or Escheat Vice Taxation,” in *“Nonsense Upon Stilts”: Bentham, Burke and Marx on the Rights of Man*, ed. Jeremy Waldron (London and New York: Methuen Publishing, 1987), 73.

¹⁸⁶ Jeremy Bentham, *The Works of Jeremy Benhtam*, ed. John Bowring (Edinburg: Willem Tait, 1843), vol. iii, 221.

be no natural rights.”¹⁸⁷ Leaving the details of the argument aside, Bentham’s skeptical argument casts doubt on the possibility of providing existence conditions for natural rights by comparing them to conventional rights. The substantive criticism is that, according to Bentham, not rights but *utility* should serve as the basic standard of moral assessment. For Bentham, the language of natural rights is “from the beginning to the end so much flat assertion.”¹⁸⁸

Hannah Arendt was one of the prominent thinkers of the twentieth century who also criticized the idea of natural rights. Although she is more well-known for her work on the subjects of politics, authority and totalitarianism, her notion of “the right to have rights” which she first articulated in *The Origins of Totalitarianism* has also been very influential. She has been considered as one of the early thinkers to make a systematic criticism of natural rights from a political perspective. Echoing Edmund Burke’s critique of the French Revolution’s Declaration of the Rights of Man that human rights were an “abstraction”, Arendt claimed that the conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when we are confronted with people who have lost all their qualities (e.g. their citizenship, social status) and specific relationships except their humanity. “The world found nothing sacred in the abstract nakedness of being human.”¹⁸⁹ Abstract nakedness of being nothing but human was the greatest danger for the victims of extermination and concentration camps, for the stateless people and refugees. The human being who had lost her right to have rights, her place in a political community, her political status in the struggle of her time, and her legal personality is left with those qualities which can become articulated only in the sphere of private life and reduced to “mere existence” in all matters of public concern.¹⁹⁰

Recently criticism of the naturalistic conception of human rights is articulated from the viewpoint of the defenders of the purportedly alternative political conception that has become popular after the publication of John Rawls’s *Law of Peoples* in 1999. One can divide the concerns about the naturalistic conceptions of human rights into two categories: (a) concerns about the naturalistic conception *as such* and (b) concerns about *specific versions* of the naturalistic conception (e.g., Griffin’s agency account).¹⁹¹ In section 2.3.2 above, I have briefly discussed Forst’s objection to Griffin’s ethical justification of human rights. Below, I

¹⁸⁷ Sumner, *The Moral Foundation of Rights*, 114.

¹⁸⁸ Bentham, “Supply without Burthen,” 74.

¹⁸⁹ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1973), 299.

¹⁹⁰ *Ibid.*, 301.

¹⁹¹ Liao and Etinson, “Political and Naturalistic Conceptions of Human Rights,” 331.

will discuss objections to the naturalistic conception in general under two headings of; i) concerns about “ordinary moral reasoning”, and ii) concerns about an ahistorical notion of universality.

As I discussed before, it is not very clear for the defenders of the political conception what counts as a natural conception. Notwithstanding the differences between particular versions, when defenders of the political conception refer to a very wide range of human rights theories as naturalistic, they most of the time refer to the views that offer an understanding of the nature of human rights conceived independently of institutional structures and the embodiment of human rights in international practice.¹⁹²

2.5.1 The concern about ordinary moral reasoning

The first concern stems from Rawls’s objection to grounding human rights (as part of his Law of Peoples) on “any particular comprehensive religious doctrine or philosophical doctrine of human nature.”¹⁹³ Liao and Etinson call this concern “the concern about Ordinary Moral Reasoning.”¹⁹⁴ They argue that according to Rawls, one should not use ordinary moral reasoning to ground human rights. In other words, one should not use “a theological, philosophical or moral conception of the nature of the human person” to ground human rights.¹⁹⁵

The reconstruction of Rawls’s argument against ordinary moral reasoning is as follows: Rawls aims to develop a ‘Law of Peoples’, a set of principles and norms (including human rights) of international law and practice, that ‘well-ordered people’ can freely agree as a basis to govern their mutual relationships and thereby establish a mutually respectful peace.¹⁹⁶ By well-ordered people he means liberal peoples and decent peoples together.¹⁹⁷ Rawls argues that grounding human rights on any particular comprehensive or religious doctrine of human nature would involve religious or philosophical doctrines that can be objectionable from the perspective of decent hierarchical peoples as being distinctive of Western political tradition and prejudicial to other cultures.¹⁹⁸ To avoid being ethnocentric in this sense, Rawls suggests that liberal and decent peoples agree not on the *grounds* but on the *role* of human rights in the

¹⁹² See for instance Beitz, *The Idea of Human Rights*, 7,53 and Raz, “Human Rights Without Foundations,” 323.

¹⁹³ John Rawls, *The Law of Peoples* (Harvard: Harvard University Press, 1999), 68.

¹⁹⁴ Liao and Etinson, “Political and Naturalistic Conceptions of Human Rights,” sec. III.i, IV.i.

¹⁹⁵ Rawls, *The Law of Peoples*, 81.

¹⁹⁶ Ibid., 3–4.

¹⁹⁷ Rawls uses the term “decent” to describe “nonliberal societies whose basic institutions meet certain specified conditions of political right and justice (including the right of citizens to play a substantial role, say through associations and groups, in making political decisions) and lead their citizens to honor a reasonably just law for the Society of People”, Rawls, *The Law of Peoples*, 3, note 2.

¹⁹⁸ Ibid., 68.

Law of Peoples. According to Rawls, this role of human rights in the Law of Peoples is to restrict the justifying reasons for war and its conduct and to specify limits to a regime's internal autonomy.¹⁹⁹

According to Rawls, if the law of peoples were justified by ordinary forms of moral reasoning, whether religious, philosophical, or moral, this may render the law of peoples unacceptable from the point of view of some well-ordered peoples who hold incompatible religious, philosophical, and moral views. Rawls's alternative proposal is that liberal and decent peoples should appeal to what he calls *public reason*. Public reason, Rawls explains, is the reason of free and equal peoples, and its principles are not derived from any particular moral, religious, or philosophical view; instead they are grounded in values and ideas that can be shared by both liberal and decent peoples. By grounding moral norms in prudential values, the naturalist tradition goes against the strategy advocated by Rawls, "who presents them as part of a distinctively *political* conception of justice, one that stands free of any comprehensive moral, religious or metaphysical doctrine."²⁰⁰

2.5.2 The concern about timelessness and irrelevance to the practice

Apart from the ordinary moral reasoning concern, another concern raised by proponents of the political conception to naturalistic accounts is that they are invariant across time and space and that they are irrelevant to the international practice of human rights.

Beitz and Raz argue that the idea of the naturalist tradition that all human beings at all times and places have human rights seems to be timeless. If we look at some of the human rights currently recognized by international practice such as "the right to education" or "the right to social security", they presuppose certain social structures and practices hence it does not make much sense to say all human beings at all times and places have them. As Raz argues it does not make much sense that the right to education and the distinctions between elementary, technical and higher education as is stated in the Article 26 (1) of the Universal Declaration applies to cave dwellers in the Stone Age.²⁰¹ Similarly, Beitz says that:

The third feature of natural rights is that their requirements are invariant across time and space. The natural rights of the tradition were supposed to be timeless in this way, but as I observed earlier (§ 5), it is hard to see how some of the rights of the declaration could

¹⁹⁹ Ibid., 79.

²⁰⁰ Tasioulas, "Human Rights, Universality and the Values of Personhood," 85, emphasis original.

²⁰¹ Raz, "Human Rights in the Emerging World Order," 40. Article 26 (1) of the Universal Declaration of Human Rights states that: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

qualify: consider, for example, the rights to social security or, again, to free elementary education (arts. 22, 26). It is reasonably clear from examples like these that its framers could not have intended the doctrine of human rights to apply, for example, to the ancient Greeks or to China in the Ch'in dynasty or to European societies in the Middle Ages. International human rights, to judge by the contents of the doctrine, are suited to play a role in a certain range of societies.²⁰²

In short, proponents of the political conception argue that human rights make sense only if one considers the historical contexts and social practices they are embedded in or they refer to. Considering human rights to be timeless, naturalistic conceptions fail to illuminate or may even distort the 'nature' of human rights as we find them in international political practice.

The answer of Liao and Etinson to this timelessness critique is that we can plausibly explain the existences of some contemporary human rights such as the right to education without abandoning the claim that human rights are timeless by making a distinction between basic rights and derived rights or between the aim and the object of a right.²⁰³ The idea is that some basic rights or the aim (goal or end) of a right can be thought to be timeless if we consider them as protections of some fundamental underlying values or goals which bear normative force. In Griffin's case those are the values we attach to agency/personhood which he lists as autonomy, minimum provision and liberty. Human rights are grounded in these three values of personhood.²⁰⁴ And, we also have 'practicalities' as a second ground.²⁰⁵ Griffin acknowledges that there are some human rights which do not apply to all societies. He gives the freedom of the press as an example. However, he suggests that we should think of human rights as having different levels of abstraction. There are some basic rights at the higher levels of abstraction which are universal and in this sense timeless. We also have lower-level human rights derived from this basic right in certain historical and social contexts. Freedom of the press, for that matter, is derived from freedom of expression and "freedom of expression is derived from, as a necessary condition of, autonomy and liberty."²⁰⁶

However, responding to the timelessness critique by distinguishing between basic and derived rights has two drawbacks. First, if there are some higher-level rights which are basic and some lower-level rights which are derived from them, one should give some criteria according to which these rights are differentiated. Griffin takes the values of personhood as central for grounding human rights and derives the content of human rights from these values. But as Tasioulas claims, Griffin does not supply "an account of the general nature of moral

²⁰² Beitz, *The Idea of Human Rights*, 57.

²⁰³ With respect to the distinction between the aim and the object of a right, a reference is made to S. Matthew Liao, *The Right of Children to be Loved* (unpublished Book Manuscript).

²⁰⁴ Griffin, *On Human Rights*, 51.

²⁰⁵ Ibid., 127.

²⁰⁶ Ibid., 50.

rights that explain why human rights properly qualify as individual moral *rights*, as opposed to interest, values, claims, goals or moral considerations of some other kind.”²⁰⁷ Griffin’s second ground of practicalities will not yield this distinction either. This is because practicalities represent a constraint that bears not only on (human) rights, but also on most parts of the moral domain such as justice, a good life. Hence, as I discussed in section 2.3.3, Griffin does not provide, a “natural and secure style of justification” of even the paradigmatic cases of human rights from these values of personhood.²⁰⁸

The second drawback is that, as long as human rights are not only political/legal rights but also *moral* rights the idea that there are some basic human rights and also derivations of them which are also human rights mean that (derived) moral rights are established by reference to other (basic) moral rights. If all human rights are (a subset of) moral rights then one needs to develop the criteria for distinguishing between basic moral rights and derived moral rights.²⁰⁹ One strategy can be to propose that there are some basic values (which either bear high-level deontic implications or not) that have specific normative importance and derive a principle of right from the importance attached to these values. This is Griffin’s strategy. After all, he anchors the normative force of human rights on the “high value” we attach to our personhood.²¹⁰ But such a strategy has the drawbacks of i) giving a theological/ethical justification of human rights which I discussed above and ii) not being equipped enough to respond to recurrent objections of ‘parochialism’ or ‘ethnocentrism’ as it diminishes the applicability of human rights to communities and groups which do not place such a high value on autonomy and liberty.

Therefore, the naturalistic conception *as such* and the particular version provided by Griffin are not properly equipped to accommodate the ordinary moral reasoning and timelessness criticisms simultaneously. Any attempt to amend the naturalistic conception to incorporate the timelessness criticism by distinguishing between basic and derived rights cannot get around the ethnocentrism charge.²¹¹

²⁰⁷ Tasioulas, “Taking Rights out of Human Rights,” 650, emphasis original.

²⁰⁸ “Natural and secure style of justification” is a phrase Tasioulas uses to refer to the kind of justification that pluralist accounts of human rights provide which is “both less counterintuitively circuitous and less of a hostage to contingencies than the personhood account.” Ibid., 663.

²⁰⁹ This is one aspect of Raz’s criticism of traditionalist approach as he says: “it is wrong [to] assume that moral rights can be established only by reference to other moral rights. Typically rights are established by arguments about the values of having them. Their existence depends on there being interests whose existence warrants holding others subject to duties to protect and promote them.” Raz, “Human Rights Without Foundations,” 335.

²¹⁰ Griffin, *On Human Rights*, 32.

²¹¹ I will examine the ethnocentrism charge in more detail in chapter 5 where I discuss objections to the idea of human rights in general.

Another concern about the naturalistic conception of human rights is that it does not incorporate or make use of considerations about the political character or discursive functions of human rights within the existing practice. This is a potential problem for the naturalistic theories. Human rights are not ordinary moral norms applying mainly to interpersonal conduct but they are also *political norms* dealing mainly with how people should be treated by their governments and institutions. Naturalistic theories conceive human rights as moral rights that all people have. The problem is not that there are no such universal moral rights and duties, but that we are not referring to them when we speak of human rights in the modern context. To see this, Pogge suggests we consider an ordinary assault in a pub, perhaps after some drinking and argument. Though the victim may be badly hurt, we would not call the assault a human rights violation. However, a police beating of a suspect in jail does seem to qualify as a human rights violation.²¹² Whereas the moral right of freedom from assault is violated in both cases, only the second case seems to qualify as a human rights violation. This suggests that, “to engage in human rights, conduct must be in some sense official.”²¹³ This ignorance of the political aspect of human rights by naturalistic theories is problematic according to Beitz as well. In his words:

International human rights are primarily claims on institutions and other social agents—one’s own government, in the first instance, and other states and international actors, when one’s own government defaults. International human rights are potential triggers of transnational protective and remedial action and should be suitable to function as justifications of it. This is part of the nature of human rights as they operate in global political discourse, and it seems almost certain to influence one’s views about the basis and contents of international doctrine.²¹⁴

Hence, both Pogge and Beitz criticize naturalistic views starting from common sense or a practical view of the role human rights play in global political discourse. I will say more about the alternative proposal of a practical or political conception of human rights in the next chapter. Before that, I will discuss the questions about the *justification* of human rights.

2.6 Justification of human rights and different modes of justification

At the beginning of this chapter, I noted that the philosophical questions about human rights are focused on the questions about the nature, content and justification of human rights. So far, I have discussed how the naturalistic accounts of human rights conceptualized the nature and content of human rights. I have argued that naturalistic accounts conceptualize human rights as depending on what they perceive essential to human standing (such as normative

²¹² Pogge, “The International Significance of Human Rights,” 47.

²¹³ Ibid.

²¹⁴ Beitz, *The Idea of Human Rights*, 65.

agency, freedom, basic interests, etc.) and they delineate the content of human rights depending on what this essential aspect of human nature or standing entails, in other words, which objects or goods are required to guarantee that specifically human status. The questions of justification are obviously related to these questions about the nature and content of human rights. For the sake of clarity, nevertheless, I discuss the questions of justification separately.

The disputes about the philosophical justification of human rights are centered on two questions:

i) *Do human rights require philosophical justification?* In other words, do we need to justify the idea of human rights by delineating the reasons or grounds depending on which they are claimed or supported?

ii) *If they do, what kind of justification?* If one's reply to the first question is positive, then the question is prompted as to what kind of justification one offers as there are different ways of justifying human rights depending on the type of reasons given in support of human rights and the methodology used in the justification.

I have already started discussing the second question and mentioned different *modes* of justification of human rights when I discussed the *ethical* justification of Griffin. However, one can possibly ask the question as to why we need to justify human rights in the first place before asking what kind of justification one is aiming for.

Philosophers like Griffin who offered justifications of human rights started from a presumption that such an effort will have some contribution to human rights practice. Griffin aims to provide a contribution in the field of ethics by offering a ground on which human rights depend and thereby bring some determinateness to the concept of human rights. This is his way of finding a solution to the phenomenon of human rights inflation which he finds problematic. However, some people question the value and significance of such a contribution to the practice of human rights.

One prominent position with respect to this question of what philosophy can contribute to human rights practice is the anti-foundationalist position of Richard Rorty.²¹⁵ Following the Argentinian jurist and philosopher Eduardo Rabossi, Rorty claims that "human rights foundationalism is outmoded and irrelevant."²¹⁶ He argues that the idea of a rationalist foundation of human rights does not make sense anymore especially from a pragmatist

²¹⁵ Rorty has developed his anti-foundationalist views on human rights mainly in the essay 'Human Rights, Rationality and Sentimentality', which he presented as the 1993 Oxford - Amnesty International Lectures. This essay is printed as Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *On Human Rights*, ed. Stephen Shute and Susan L. Hurley (New York: Basic Books, 1993), 111–134.

²¹⁶ *Ibid.*, 116.

perspective.²¹⁷ According to Rorty, if one has a pragmatic perspective which is concerned with the question of casual efficacy and the efficient ways of how to achieve “the utopia sketched by the Enlightenment”, then the meta-ethical question of acquiring moral knowledge is irrelevant.²¹⁸ Rorty claims that the most efficient way of promoting human rights is manipulating feelings and progressing what he calls “sentimental education” rather than increasing moral knowledge.²¹⁹

One can understand Rorty’s anti-foundationalist position with respect to the justification of human rights in two senses. The first one can be called ‘anti-foundationalism in a weak sense’ that denies the necessity and possibility of founding human rights on metaphysical grounds such as God’s will, natural law, religious worldviews or an objective notion of the good. When Rorty attacks attempts to found human rights culture on transcultural and “transcendental status of the common moral consciousness”, he seems to be attacking attempts to justify human rights on metaphysical grounds.²²⁰ He argues that we should stop searching for universal human nature or morally relevant transcultural facts as foundations of human rights. However, there can be a second position with respect to the justification of human rights which can be called ‘anti-foundationalism in a strong sense’ that denies the necessity and possibility of founding human rights on *any* grounds either metaphysical or non-metaphysical.

Anti-foundationalism in a weak sense does not imply anti-foundationalism in a strong sense. In other words, objecting to transcendental or metaphysical justifications does not deny the possibility of providing non-transcendental justifications of human rights.²²¹ One can object to founding human rights on metaphysical grounds but still think that it is possible to justify human rights based on other grounds. Rainer Forst’s justification of human rights is an example of such a non-transcendental justification; it is agnostic towards the question of what counts as an ethically worthwhile or good life.²²² In other words, negating transcendental and metaphysical justifications does not necessarily imply a negation of *all* justifications.

²¹⁷ By ‘anymore’ Rorty means that in the past, for example at the time of Kant, the idea of a rational foundation of morality “still made a kind of sense but it makes sense no longer. . . . Kant wrote in a period when the only alternative to religion seemed to be something like science. In such a period, inventing a pseudoscience called “the system of transcendental philosophy”. . . might plausibly seem the only way of saving morality from the hedonists on one side and the priests on the other”, Ibid., 244, n.4.

²¹⁸ Ibid., 118.

²¹⁹ Ibid., 122ff.

²²⁰ Ibid., 120.

²²¹ By ‘transcendental justifications’ I mean justifications, which refer to a transcendental resource such as God’s will or natural law as the basis of human rights. ‘Metaphysical justifications’ refer to justifications that refer to an ideal of the good associated with religious or metaphysical worldviews or an objective notion of the good.

²²² I will examine Forst’s justification of human rights in section 4.4.

Therefore, it is not clear why we have to choose between a metaphysical or transcendental justification of human rights and a pragmatist anti-foundational position in the strong sense of not providing any justification at all. Instead, one can choose the middle ground of founding human rights on non-metaphysical grounds which are neutral between different comprehensive worldviews.

Moreover, it is implied in Rorty's claim that he has a commitment to the aim of bringing about the Enlightenment project. His claim is that reasoning about what is the right thing to do is not the most efficient way for achieving this aim. If one shares Rorty's view that what matters is to change human behavior so as to have a higher degree of respect for human rights, then he may be right that appealing to sentiments and the cultivation of sympathy might be more effective in that respect. However, one can still wonder why it is desirable, in the first place, to bring about and spread the Enlightenment project to other communities and groups that do not endorse it, if it does not have a value and universal validity. If we do not know why (and for which reasons) we are aiming at the realization of human rights, how can we know for sure that we are justified in trying to change a particular situation, and how can we appeal to the sentiments of the people to achieve those aims? In other words sentiments can have a role in realizing a higher degree of respect for human rights but this does not mean that they can (exclusively) ground human rights.

Similarly, Joseph Raz, one of the adherents of the political conception whose account I will examine in the next chapter, also argues for "human rights without foundations."²²³ Rorty points to sentiments whereas Raz argues that we need to look at the role human rights play in international relations. However, even if in that case the question of justification will be posed anew; this time the existing or desired system of international human rights will require justification.²²⁴ If the existing systems of human rights are taken for granted without justification, human rights will lose their critical bite. Moreover, the claim that there is agreement in practice about human rights is an empirical claim which is subject to serious doubts.

Therefore the skepticism about the need for a justification of human rights can come from different standpoints such as Rorty's pragmatist position or Raz's political approach. I will say more about these positions when I examine the political conception of human rights in the

²²³ Raz, "Human Rights Without Foundations."

²²⁴ In his recent work Buchanan also raises a similar objection. He claims that it is a deficiency of contemporary philosophical work on human rights that it has not focused on the moral evaluation of the system of international legal human rights and more specifically, has not taken up the task of determining whether it is morally justifiable, Buchanan, *The Heart of Human Rights*, 10.

next chapter and skepticism about the idea of human rights in general in chapter 5. For the time being, I hope to have shown that Rorty's antifoundationalist argument presupposes a stringent conception of a foundation as an objective and metaphysical source substantiating human rights. It does not necessarily apply to all kinds of justification.

One important difference among different conceptions of human rights is their justificatory methods and procedures. I call this aspect the *mode* of justification. With respect to human rights there are two broad modes of justification: *ethical* and *moral* justifications. Moral justifications are in turn divided into *monological* and *intersubjective* modes of moral justification.

An *ethical* justification derives the notion of right from the notion of good. Griffin provides such a justification. He derives human rights from a basic interest in pursuing the good. Certain subjective interests are considered to be fundamental for normative agency and they are turned into intersubjectively justifiable claims for rights. Normative agency understood as our capacity to "choose and to pursue our conceptions of a worthwhile life" stands at the center of Griffin's view.²²⁵ So even though Griffin does not attach human rights to any *particular* notion of the good, it is still the case that the autonomy or the capacity of choosing what we see as a good life for ourselves, or being "self-deciders" about our good life is the core of our human status in his view. On this view, the good life can only be called as such, if it is autonomously chosen and pursued. This notion of autonomy can be reasonable and common. However, when Griffin argues that people value autonomy because it is necessary to pursue the life they deem good, he smuggles a particular ideal of a good life into his notion of being a person to the fullest degree.²²⁶ Griffin argues that "personhood is the capacity to choose one's own path through life—that is, not be dominated or controlled by someone."²²⁷ However imagine someone who believes the good life consists in following a higher calling or in one's duties as a member of a particular community in a traditional sense. Such persons' perceptions of what constitutes the good life contradict Griffin's notion of agency being a self-chooser. Hence, Griffin's account is not neutral with respect to a particular notion of the good life. These types of justification of human rights are subject to the ethnocentrism charge as they diminish the applicability of human rights to communities and groups which do not place such a high value on autonomy and liberty.²²⁸

Moral justifications on the other hand, justify human rights without making reference to a

²²⁵ Griffin, *On Human Rights*, 25.

²²⁶ Raz, "Human Rights Without Foundations," 23.

²²⁷ Griffin, *On Human Rights*, 33.

²²⁸ See section 5.2.3 in more detail for ethnocentrism charge.

substantive notion of the good but rather to a moral principle or rule. Gewirth's justification of human rights is a moral justification. By grounding human rights in a moral principle (the principle of generic consistency), Gewirth provides a moral justification of human rights. Moreover, his moral justification is *monological*; all legitimate rights claims can simply be derived from the perspective of a single agent.

Finally, a discourse-theoretic justification (i.e. Rainer Forst's justification of human rights, see section 4.4) is an *intersubjective* moral justification. In Forst's account, human rights are seen as the result of intersubjective, discursive construction of rights claims that cannot be reciprocally and generally denied *between* persons who respect one another's right to justification.

These different modes of justification of human rights make the different conceptions of human rights vulnerable to different objections. As mentioned before, Griffin's ethical justification is open to the ethnocentrism charge whereas a monological moral justification can make a human rights theory vulnerable to the individualism objection. Gewirth's theory of human rights can be considered to be individualist in two respects. First, it is individualist in the sense that he argues for particular generic rights on the basis of characteristics of human individuals as such, i.e. human action. Second, his justification is monological: the generic rights are based on requirements of action of individual actors *per se*. The agent must recognize the rights of others as a matter of rationally consistent behavior, not for instance out of a moral duty *towards* others or a principle of reciprocity.²²⁹ For the aim of understanding how human rights claims are justified within real-life struggles, I will argue that an intersubjective moral justification fares better than ethical and monological moral justifications because such a justification is not susceptible to the ethnocentrism and individualism objections. I will examine different objections to the idea of human rights in general in chapter 5. Before that, however, I will continue with explicating different conceptions of human rights in the next two chapters; namely the political and discourse-theoretic conceptions in chapters 3 and 4 respectively.

2.7 Conclusion

Asking the apparently straightforward question with respect to the rights struggles with which I began this dissertation—whether the right to work and the right to housing should be

²²⁹ If one sees that it is *duty* and respect towards *others* rather than action where the ground and essence of moral normativity lies (e.g. duty to recognize others as justificatory beings in Forst's account), then Gewirth's proposal of purposive action as the 'ultimate' ground will not work. I will examine the individualism objection in more detail in section 5.2.2.

considered as being human rights—takes us to the core of the conceptual questions about human rights. In this chapter I started to examine the first of two stylized philosophical views on human rights, namely the naturalistic conception of human rights. By examining the literature and the idea of human rights derived from the tradition of natural rights and natural law, I have reconstructed the conditions for a rights theory to be a natural rights theory. A rights theory can be considered a natural rights theory if it 1) employs a model of rights, 2) assigns some set of rights to some set of individuals on the basis of some natural criterion, 3) treats these rights (only rights) as morally basic and 4) claims that they are objective. Confronting this logical reconstruction of the conditions for a rights theory to be a natural rights theory with theories provided in the literature results in a reformulation of the conditions. Natural rights theories have two basic characteristics: first, they contain some rights (no matter whether these rights are conceptualized as protected interests, protected choices, or a combination of the two) and, second, the criterion of possessing those rights is a natural property. The implication of this reconstruction of the conditions for the idea of human rights is twofold. We can say two elements form the core of the naturalistic view of human rights. First, human rights are not contingent on existing laws and social practices. The second element that forms the core of the naturalistic view of human rights is the idea that the ground (s) (or the justificatory basis) for making a rights claim inhere somehow in each person's nature or status as a human being.

After this exercise of giving some conceptual clarification and providing a reconstruction of the conditions which make a right theory a natural rights theory and a conception of human rights a naturalistic conception of human rights, I have examined three important contemporary versions of the naturalistic conceptions of human rights provided by Alan Gewirth, James Griffin and John Tasioulas. Gewirth argues that it is possible, indeed necessary to accept that there are human rights to generic goods of action. Griffin conceptualizes human rights as protections of our human standing as normative agents and he delineates values of personhood as being the relevant values for our normative agency that confer rights. Tasioulas criticizes Griffin's grounding human rights solely on personhood and offers a pluralist account of human rights.

In this chapter, I have also reflected on the implications of the naturalistic conception of human rights for the claims that there is a human right to work and a human right to housing. The route taken by the naturalistic theories is to specify the especially important human interests or values that confer rights (that give reasons or grounds for rights claims) and they derive the list of rights from these designated grounds. In section 2.5, I have briefly

mentioned some objections to the naturalistic conception of human rights from which the second stylized view on human rights, the political conception, has been initiated. In the last section, I have reflected on the question whether human rights require justification and I have argued that an antifoundationalist position which criticizes metaphysical and transcendental justifications of human rights does not imply that human rights do not need justification at all. I have also differentiated between different modes of justifications, moral and ethical justification, and monological moral justification and intersubjective moral justification of human rights. This differentiation is relevant for investigating the vulnerability of different conceptions to some of the most influential objections to the idea of human rights, such as the ethnocentrism objection and the individualism objection.

In the next chapter, I will examine the political conception of human rights following a track similar to the one in this chapter. I will begin by examining the Rawlsian origins, and some contemporary versions of the political conception of human rights. Then, I will reflect on what makes a political conception of human rights political. I will subsequently explore the implications of the political conception for the two cases and examine the objections to the political conception.

3 The Political Conception of Human Rights

3.1 Introduction

In the previous chapter, I stated that there are two stylized views about the philosophical understanding of human rights: the naturalistic conception and the political conception. I examined the naturalistic conception and some specific versions of this conception. I also examined some implications of the naturalistic conception with respect to the cases I focused on. In this chapter, I will continue by examining the second view, the political conception, and discuss its implications for the specific rights to work and housing.

As analyzed in the previous chapter, the influence of the tradition of natural rights thinking on the contemporary idea of human rights has been multifaceted and complex, and there are various positions within the naturalistic conception with different philosophical commitments. Yet, we can still take it that the naturalistic conception is one of the two dominant views within the Anglo-American philosophical understanding of human rights. Instead of tracing the origins of the objections to the naturalistic conception back to the first objections to the idea of natural rights (e.g. positive law understanding of human rights by, for instance, Bentham), I will start with a turning point—a *political* turn—in the contemporary philosophy of human rights after the publication of John Rawls’s *Law of Peoples* in 1999. It is frequently perceived that Rawls was the first to put forth the political conception of human rights.²³⁰ Without doubt, one can argue that the idea of a political conception of human rights had preceded Rawls, but when I say ‘Rawlsian origins’ I am referring to the Rawlsian revival in Anglophone thought on rights which already started with his epoch-making *A Theory of*

²³⁰ For instance, see these remarks: “The orthodoxy has been challenged, however, by what are now generally known as ‘political conceptions’ of human rights, as John Rawls first set forth in *The Law of Peoples*”, Siegfried Van Duffel, “Moral Philosophy,” in *The Oxford Handbook of Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 33. “John Rawls introduced the idea of a political conception of human rights in his book, *The Law of Peoples*”, James Nickel, James, “Human Rights”, *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/win2014/entries/rights-human/>, “Since the publications of John Rawls’, *The Law of Peoples*, in 1999, the still nascent field of the philosophy of human rights has become increasingly divided. On the one hand, there are the “political” or “practical” theorists who, inspired by Rawls, believe that human rights should be understood in light of their role or function in modern international politics...”, Adam Etinson, “Human Rights - Moral or Political?”, forthcoming book introduction, available at <http://www.adametinson.com/Human%20Rights%20-%20Moral%20or%20Political%20-%20Volume%20Outline.pdf> (visited on 10 April 2014). *The Law of Peoples* was published in 1999 which is a relatively late date concerning the human rights discussion, however Rawls had before delivered an Oxford Amnesty Lecture in 1993 with the same title, the original essay was published in the volume *On Human Rights: The Oxford Amnesty Lectures*, John Rawls, “The Law of Peoples,” in *On Human Rights*, ed. Stephen Shute and Susan L. Hurley (New York: Basic Books, 1993), 41–82.

Justice (1971) and was followed by his challenge to the orthodoxy in moral thinking on human rights in *The Law of Peoples*.²³¹

As briefly mentioned in the previous chapter, Rawls criticizes grounding the idea of human rights on a theological, philosophical or moral conception of the nature of the human person. Instead, he argues, one should start from the *role* human rights play in the Law of Peoples—a set of principles and norms (including human rights) of international law and practice that well-ordered people (both liberal as well as nonliberal but decent societies) can accept as the standard for regulating their behavior toward one another. In recent debates alternatives to the naturalistic view of human rights which adopt Rawls’s political stance have been developed. This alternative which is called the political/institutional²³² approach or practical approach²³³ starts from a functional account of the discursive practices of international human rights and it stresses the political-legal aspect of human rights.

In this chapter, I will examine the political conception of human rights. I will start by tracing the Rawlsian origins of the idea of a political conception of human rights (section 3.2). Then I will briefly examine some recent theoretical positions of the political conception of human rights (section 3.3). In section 3.4, I will try to elucidate what is *political* about the political conception. In section 3.5, I will examine the implications of the political conception for the claims that there are human rights to work and housing. Finally, I will discuss some objections to the political conception of human rights (section 3.6).

3.2 Rawlsian origins

Rawls’s remarks on human rights and their political importance are scattered throughout his work.²³⁴ Nevertheless, the essentials of Rawls’s view of human rights can be summarized in the following points:²³⁵

²³¹ In *Theory of Justice*, Rawls had not used the expression of human rights and his reclaiming of individual rights has remained restricted to the liberal nation-states. Nevertheless, the structure of the arguments in *A Theory of Justice* and in *Law of Peoples* is parallel: both eight principles of the law of peoples and principles of social justice are justified through the device of the original position. Some earlier thinkers such as Hannah Arendt are also mentioned as precursors of a political approach to human rights; see, for instance Cohen, “Rethinking Human Rights.” However, the understanding of political rights is different for Rawls and Arendt such that Cohen calls her approach inspired by Arendt’s notion ‘the right to have rights’, a ‘new’ political conception of human rights different from Rawlsian political approaches, *Ibid.*, 586ff.

²³² Cohen, “Rethinking Human Rights.”

²³³ Beitz, *The Idea of Human Rights*.

²³⁴ See, in particular, Rawls, *The Law of Peoples*, 36-38, 65-66, 68, 78-81, 80 n. 23, 81 nn. 25-6, 93, 93 n. 6.

²³⁵ One can say that Rawls’s account of human rights is laid out in its entirety in *The Law of Peoples*. Rawls does not mention the notion of human rights at all in his *A Theory of Justice* and he only mentions it in passing in *Political Liberalism*. In his *A Theory of Justice* Rawls discusses rights and duties incurred by a notion of justice that applies to liberal democracies whereas the notion of human rights as part of international law binding on all peoples are the subject of *The Law of Peoples*. However, the justificatory strategy, namely the argument from the

i) *A special class of urgent rights.* Human rights in the Law of Peoples express a special class of urgent rights—violation of which is condemned by both reasonable liberal peoples and decent hierarchical peoples.²³⁶

ii) *The role of human rights in the Law of Peoples.* Human Rights play a special role as part of a reasonable Law of Peoples: they “provide a suitable definition of, and limits on, a government’s internal sovereignty” and “they restrict the justifying reasons for war and its conduct.”²³⁷ For Rawls, the role of human rights is that their violation brings sovereignty’s legitimacy into question and justifies an intervention.

iii) *The universality of human rights.* The political (moral) force of human rights, honored by both liberal and decent hierarchical regimes, “extends to all societies, and they are binding on all peoples and societies, including outlaw states.”²³⁸ Human rights are ‘universal’ in this sense that they apply to all contemporary societies.

iv) *Human rights are not peculiarly liberal.* Rawls restricts human rights to a list of a few fundamental rights: to a proper subset of the rights possessed by citizens in a liberal constitutional democratic regime, or of the rights of the members of a decent hierarchical society. The list includes: “the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).”²³⁹ This list does not include all the rights that have been stated as human rights in various international declarations. For example the rights to freedom of expression (Article 19 in the UDHR) and freedom of association (Article 20 in the UDHR) or the right of democratic political participation (Article 21 in the UDHR) are not included.

v) *The idea of public reason.* Human rights are elements of the public reason of the Society of Peoples.²⁴⁰ Contrary to the naturalistic theories there is no appeal to any

Original Position, is similar for the justification of human rights in *The Law of Peoples* and the justification of the principles of justice in *A Theory of Justice*. The contracting parties are individuals in *A Theory of Justice* and peoples in *Law of Peoples*.

²³⁶ Ibid., 79.

²³⁷ Ibid., 27, 79.

²³⁸ Ibid., 81. Outlaw states are certain regimes which “refuse to comply with a reasonable Law of Peoples” Ibid., 5.

²³⁹ Ibid., 65.

²⁴⁰ As mentioned before (see 2.5.1), the idea of public reason is the reason of free and equal peoples in deciding about public matters. The idea is present in the works of Kant and Rousseau as well as in Rawls and Habermas. Despite the differences among their views, the basic idea is that some moral or political rules (human rights in this context) can rightly be imposed on persons (or on peoples in the law of peoples) when the rules can be justified by appeal to ideas or arguments that those persons (peoples in Rawls’ law of peoples), at some level of idealization, endorse or accept.

independent philosophical conception of a human right in Rawls's account of the content or authority of the doctrine of human rights.²⁴¹ Human rights are values about which liberal and decent societies are supposed to agree, each for their own reasons. In other words, Rawls suggests that there is not a single normative ground for a conception of human rights, but there are liberal grounds for liberal conceptions of human rights and others grounds for other conceptions.²⁴²

Despite the fact that Rawls's restriction of the function and content of human rights is criticized (I will discuss this criticism in section 3.6), the basic insight implicit in Rawls's thought has been appreciated and utilized in recent developments of the political conception of human rights. This insight is that we might frame our understanding of the nature and content of the idea of human rights by identifying the *role* this idea plays in the public reason of international society.²⁴³

3.3 Recent versions of the political conception

After this brief summary of the Rawlsian origins of the political conception, in this section, I will briefly consider in turn five political conceptions provided by Joseph Raz, Charles Beitz, Thomas Pogge, Joshua Cohen and Mathias Risse. Raz and Beitz are self-proclaimed adherents of the political conception. Therefore, I believe that examining their accounts is instructive for grasping an idea of human rights different than the naturalist conception. According to widespread interpretations in the literature, Pogge and Cohen are also considered to be developing a political conception.²⁴⁴ I will also examine a recent account of human rights provided by Risse. It is less straightforward to classify Risse's account of human rights as a political conception, because it is different than other scholars mentioned; he does not use the Rawlsian framework.²⁴⁵ Nevertheless, I believe examining his account

²⁴¹ Beitz, *The Idea of Human Rights*, 99.

²⁴² Forst, "The Justification of Human Rights," 714.

²⁴³ Beitz, *The Idea of Human Rights*, 100, 102.

²⁴⁴ Baynes counts the accounts of both Pogge and Cohen as versions of the political conception, Kenneth Baynes, "Toward a Political Conception of Human Rights," *Philosophy & Social Criticism* 35, no. 4 (2009): 371–390; Kenneth Baynes, "Discourse Ethics and the Political Conception of Human Rights," *Ethics & Global Politics* 2, no. 1 (2009): 1–21. Wenar also considers Pogge's account of human rights to be a political conception, Leif Wenar, "The Nature of Human Rights," in *Real World Justice: Grounds, Principles, Human Rights and Social Institutions*, ed. Andreas Føllesdal and Thomas Pogge, vol. 1, Studies in Global Justice (Springer Netherlands, 2005), 285–93. Cohen's account is considered to be a political conception by many scholars. For some examples, see Cohen, "Rethinking Human Rights"; Gilibert, "Humanist and Political Perspectives on Human Rights," 490; Duffel, "Moral Philosophy," 33.

²⁴⁵ In fact, according to Risse himself, his membership account is a *basis-driven* conception of human rights. In this sense, it is closer to orthodox accounts which are basis-driven according to Risse. He makes a distinction between *basis-driven*, *principle-driven* and *list-driven* conceptions of human rights. Basis-driven accounts begin with the specification of the basis on which human rights are held, which leads to a principle, which in turn leads

under a political conception is fruitful as he claims to develop a *contingent* account of human rights. Moreover, Risse considers the right to work as a human right from the perspective of his account which is peculiarly instructive for my research as the right to work is one of the cases on which I focus. For this reason, Risse's argument is good to illustrate how a contingent account of human rights justifies a human right to work.

Below, I have grouped these accounts in two groups. Raz, Beitz and Pogge, notwithstanding the differences among them, have incorporated and extended the Rawlsian insight that human rights are standards of legitimacy. For Cohen and Risse, the main emphasis has been on the role of human rights for membership to the global political community. However, this grouping has been made for the sake of exposition and it is not claimed to be mutually exclusive or exhaustive.

3.3.1 Human rights and standards of legitimacy: Joseph Raz, Charles Beitz and Thomas Pogge

A well-known proponent of the political conception of human rights is Joseph Raz. In the article "Human Rights without Foundations", Raz argues that the view which he calls "the traditional view" has an understanding of the nature of human rights which is so remote from the practice that it is irrelevant to it. These views take human rights to be those important rights that are grounded in our humanity. However, Raz argues that it is not clear why human rights are important rights if they are understood along the lines of the naturalistic conception. "Neither being universal, that is rights that everyone has, nor being grounded in our humanity, guarantees that they are important."²⁴⁶ Instead, he argues, if one looks at the practice of human rights, one realizes that a significant threshold of importance of a human right is that its violation justifies limiting state sovereignty. In his words: "observation of human rights practice shows that they are taken to be rights which, whatever else they are, set limits to the sovereignty of states, and therefore arguments which determine what they are, are ones which, among other things, establish such limits."²⁴⁷

Raz argues that the rejection of the universality of human rights as understood by the naturalistic conception does not imply moral relativism. A political conception, he argues,

to the list of human rights. Practical accounts, on the other hand are list or principle-driven according to Risse. They may start with a list of human rights within international law or a principle about the function human rights play in international relations, Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint," 17. Perhaps, Risse's conception should not be classified as a political conception at all. Still I examine it in this chapter because it offers a contingent (not naturalistic) account of human rights which entails a human right to work.

²⁴⁶ Raz, "Human Rights Without Foundations," 323.

²⁴⁷ Ibid., 332.

recognizes the universality of morality. Human rights are moral rights held by individuals. But not all moral rights are human rights. Individuals have them when the conditions are appropriate for governments to have the duties to protect the interests which the rights protect. And, the rights that are given institutional recognition are regarded as human rights by the political conception. This is why, for instance, the right that people who made promises to us shall keep them is not a human right whereas the right to education is a human right.

Raz argues that there are three layers of argument for a rational justification of human rights. First, some individual interest, in combination with how social conditions require its satisfaction in certain ways, establishes an individual moral right. It is also possible to think that some rights are rock-bottom in the sense that they are not derived from any individual interest. Second, under some conditions states are to be held under the duty to respect or promote the interest (or the rights) of individuals identified in the first part of the argument.²⁴⁸ The third layer shows that states do not enjoy immunity from external interference regarding their success or failure to respect the right in question. If all three layers of the argument succeed, then we have established that a human right exists. For instance, at the first layer we can argue that there is an interest of the individual to be equipped with whatever knowledge and skills are required for her to be able to have a rewarding life in the conditions in which she is likely to find herself. The way in which social conditions require the satisfaction of the interest (for instance via formal instruction) is a contingent matter. At the second layer, it is argued that under some conditions the state should be the guarantor that education is provided, and when this is the case, people have a right to education. And, when there are more or less the same conditions throughout the world, the question of the last layer arises: should states enjoy immunity from external interference depending on their success or failure to respect the right to education of people within their territory? If the conditions of the international community are such that they should not enjoy such immunity then the right to education is a human right. Raz states that to derive the conclusion at each layer depends on the considerations specific to the layer. In this sense human rights have a rational justification but “they lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations.”²⁴⁹

²⁴⁸ In the second layer, Raz acknowledges that: “[w]ith the growth of multinational corporations and of transnational law and organizations, this second condition will be bypassed in many cases, and there will be more and more cases in which no single state will have a primary responsibility for the enforcement of human rights. Rather, the responsibility will rest directly with international bodies which mandate state actions to protect the rights.” Ibid.

²⁴⁹ Ibid., 336.

Another prominent proponent of the political conception of human rights is Charles Beitz. In his *The Idea of Human Rights* (2009), after critically examining two theoretical positions (naturalistic and agreement views) about the nature of human rights, Beitz argues that these views distort rather than illuminate human rights practice.²⁵⁰ Following Rawls, he suggests that we do better to approach human rights *practically*, not as the application of an independent philosophical idea to the international realm, but rather as a political doctrine which has a certain role in global politics.²⁵¹ According to Beitz, “the human rights enterprise” is a discursive and political practice that exists within a global discursive political community. The members of this practice, including governments of states, inter- and supra-national organizations, NGOs, use the practice’s norms for giving reasons in deliberation and arguments about how to act. The norms of practice are expressed in the main international human rights documents although these formulations are subject to reformulation and revision in practice.²⁵² A practical conception, in Beitz’s view, takes this doctrine and practice of human rights as we find them in international political life as the source materials for the construction of a conception of human rights.²⁵³

Beitz proposes a two-level model that describes in general terms the roles played by human rights in the public normative discourse of global politics. In this model, human rights are protections of urgent individual interests against standard threats. At the *first level*, the political institutions of states (including their constitutions, laws, and public policies) are bearers of primary responsibilities to respect and protect human rights. A government’s failure to carry out its first level responsibilities may be a reason for *second level* agents outside the state such as other states and non-state agents, the international community and its agents to take action.²⁵⁴ In this sense, there is a division of labor between states as the bearers

²⁵⁰ I examined naturalistic conceptions of human rights in the previous chapter. By agreement views, Beitz refers to theories that conceptualize human rights as standards that are or might be “objects of agreement among diverse moral and political cultures”, Beitz, *The Idea of Human Rights*, 10. Here, I leave the agreement view of human rights aside because as Beitz himself acknowledges, this view can be seen as a “close cousin” of the naturalistic view (of naturalistic views, for example, which conceptualize human rights as protections of interests shared by all human beings) and it tends to be “found more often in social-scientific than in philosophical discussions of human rights, Ibid., 73. Although, I refer to some proposals to think of human rights as matters of intercultural agreement in chapter 5, I do not take what Beitz labels agreement theories to be a sufficiently developed and unified view such that it can be considered as a distinct conception of human rights.

²⁵¹ Beitz argues that although he does not completely endorse Rawls’s view of human rights as presented in his *The Law of Peoples*, the basic insight that is implicit in Rawls’s way of conceiving human rights (that we might frame our understanding of the idea of a human right by identifying the roles this idea plays within a discursive practice) is instructive in developing an alternative view of human rights, see Ibid., 96–102.

²⁵² Ibid., 8–9.

²⁵³ Ibid., 102.

²⁵⁴ Ibid., 109.

of primary responsibilities to respect and protect human rights and the international community and its agents as the guarantors of these responsibilities.²⁵⁵

The following three aspects of the practical conception impose conditions on determining whether a right is a genuine human right or not; i) human rights are urgent individual interests that are a matter of ii) national responsibility (“in the absence of protection, there is a significant probability that domestic-level institutions will behave, by omission or commission, in ways that endanger this interest”), and iii) international responsibility (“there are permissible means of international action, aid, and assistance such that, if they were effectively carried out, the interest would be less likely to be endangered and that these means would not be unreasonably burdensome for those who have reason to use them”).²⁵⁶ However, conditioning the authenticity of a human right upon the availability of effective and reasonable international means of guaranteeing it, serves to *constrain* the list of *bona fide* human rights.²⁵⁷ For example, as Beitz argues it is unlikely that there is a genuine human right to democracy in his account. This is because there may be non-democratic regimes that can nevertheless meet the urgent social and economic needs of its citizens and the international means of guaranteeing the right to democracy might be non-effective as is historically proven to be the case.²⁵⁸

Another political conception of human rights which considers the role of human rights in setting standards of legitimacy is the institutional understanding of human rights proposed by Thomas Pogge.²⁵⁹ Pogge starts by delineating six features any plausible understanding of human rights must incorporate. First, human rights express *ultimate moral* concerns: people have a moral duty to respect human rights. Second, human rights express *weighty* moral concerns, which normally override other normative considerations. Third, these moral concerns are focused on *human beings*, all human beings and only human beings have human rights and the special moral status associated with them. Fourth, with respect to these moral

²⁵⁵ Ibid., 108.

²⁵⁶ Ibid., 111.

²⁵⁷ Adam Etinson, “To Be or Not to Be: Charles Beitz on the Philosophy of Human Rights,” *Res Publica* 16, no. 1 (2010): 445.

²⁵⁸ In chapter 6, I will defend a democratic account of human rights according to which there is an internal connection between democracy and human rights. This means that right-bearers are authors of the right-claims themselves. In my understanding, democracy in its connection to human rights is not a question about whether there is a separate human right to democracy, whether democracy is the best means to guarantee other rights, or whether - if there is a human right to democracy - it should be guaranteed by intervention. Rather, my approach is democratic in the sense that right-claims are justified through a procedure of will- and opinion-formation and authorship by those who are bearers of those rights. Hence, people are not passive *recipients* of the objects of human rights but active *authors* of them.

²⁵⁹ Pogge, “The International Significance of Human Rights”; Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002).

concerns, all human beings have *equal status*: they have exactly the same human rights. Fifth, human rights express moral concerns that are *unrestricted*, i.e., they ought to be respected by all human agents regardless of their particular epoch, culture, religion, moral tradition or philosophy. Sixth, these moral concerns are *broadly sharable*, i.e., capable of being understood and appreciated by persons from different epochs and cultures, and by adherents of a variety of different religions, moral traditions and philosophies.²⁶⁰ After mentioning that various understandings of human rights are consistent with these six points, and critically examining three such understandings of human rights, Pogge suggests an understanding of human rights that he endorses. Human rights, on Pogge's account, are to be understood as claims against the institutional order of any comprehensive social system: "postulating a human right to X is then tantamount to declaring that every society and comparable social system ought to be so organized that, as far as possible, all its members enjoy secure access to X."²⁶¹

In support of his institutional account, Pogge offers an interpretation of article 28 of the UDHR which states: "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."²⁶² Pogge argues that this article has a particular status in the sense that it does not add a further right to the list of human rights; rather it puts a background condition for all human rights postulated in the other articles of the declaration as its reference to "the rights and freedoms set forth in this Declaration" suggests. Pogge endorses a weak interpretation of this condition according to which all human beings have a claim that any institutional order imposed on them be one in which their postulated rights and freedoms can be fully realized.²⁶³ Pogge's argument is that there exists a global institutional order and global basic structure that makes everyone who collaborates with it responsible for securing human rights.

Pogge's argument that human rights (he focuses in particular on the right to be free from poverty) are claims on the global institutional order is appealing and has some strengths. Firstly, it provides, at least in principle, a more plausible assignment of responsibilities in regard to the underfulfillment of human rights: government leaders and other officials have primary responsibility for securing rights of their citizens but the governments and citizens of

²⁶⁰ Thomas Pogge, "Human Rights and Human Responsibilities," in *Global Justice and Transnational Politics*, ed. Pablo De Greiff and Ciaran Cronin (Cambridge: MIT press, 2002), 159–160.

²⁶¹ Ibid., 165.

²⁶² For Pogge's discussion, see "Human Rights and Human Responsibilities," 164 ff.

²⁶³ A strong interpretation of article 28 would be one which includes the additional statement that human beings have a claim that the establishment of such an order in "any (state-of-nature or 'failed state') contexts in which no effective institutional order exists", Ibid., n. 30. Pogge rejects this stronger reading of the article because in a supposed state-of-nature, it would be unclear on whom the responsibility to bring about such an order fell.

the wealthy countries also have responsibility for securing rights of distant others as they maintain the global unjust institutional order. Moreover, though I will not pursue the topic here, Pogge claims that his institutional understanding of human rights has two additional advantages of sidestepping the long-standing debate between positive and negative rights and duties, and rendering human rights more broadly shareable. Although these advantages make Pogge's account attractive, it is not clear how the duty not to participate in unjust social institutions provides the best basis for understanding the rights individuals are entitled to claim. Many rights in the UDHR such as rights to legal standing, participation and association can be seen as conditions for membership in a society and not primarily as remedies for the consequences of unjustly imposed institutions.²⁶⁴ I now turn to two accounts which conceive human rights as conditions of membership.

3.3.2 Human rights and membership: Joshua Cohen and Mathias Risse

I would like to consider two additional political conceptions of human rights suggested by Joshua Cohen and Mathias Risse. On Cohen's view human rights norms are best understood not as norms of proper conduct of a good or righteous life but rather as norms founded on an idea of *membership* or *inclusion* in an organized political society.²⁶⁵ Hence, like Pogge, Cohen has an associational account of human rights: rights and corresponding duties are created by the special relationships people have with others, rather than as claims individuals have simply in virtue of being human. Again like Pogge, Cohen delineates three features of human rights and makes two methodological assumptions. He argues that human rights are *universal* in being owed by every political society to all individuals, they are requirements of political morality which need not be expressed in law to have normative force and they are *urgent* requirements of political morality. Moreover, an account of human rights must meet a condition of *fidelity*: if there are human rights, then at least some substantial range of rights identified by the principal human rights documents like the UNDR might be among those rights. Finally, Cohen assumes a condition of *open-endedness*: we can, through normative reasoning, argue in support of additional rights.

After delineating the features and assumptions every conception of human rights needs to meet, Cohen proposes his membership account according to which human rights are international norms that specify the basic conditions for membership or inclusion in a political

²⁶⁴ For a critique of Pogge's account of human rights along these lines see Baynes, "Toward a Political Conception of Human Rights," 382.

²⁶⁵ Cohen, "Is There a Human Right to Democracy?," 237.

society.²⁶⁶ The membership account of Cohen can be read in two ways. On the first reading, the norms appear to specify conditions of membership any political society must satisfy to be recognized as a member of the international community. This reading is close to Rawls's position that treats human rights as minimal conditions for a society that makes a plausible claim to political self-determination. Again like Rawls's account, the set of rights derived from Cohen's membership account is less demanding than the full-set of rights required for a liberal-democratic society. For instance, there is not a human right to democracy according to Cohen's conception. On the second reading, human rights are norms of membership owed by political societies to *individual* members of those societies. However, this notion of membership is a normative one—distinct, for example, from living in a territory. One central feature of the normative notion of membership is that a person's interests are taken into account by the political society's basic institutions: to be treated as a member means that one's interests are given due consideration.²⁶⁷ On this second reading, the idea is that, beyond the traditional nation-state, transnational institutions have created associative relations with others that in turn give rise to normative obligations that are more demanding than basic humanitarian concerns.²⁶⁸ Although these two readings are not necessarily incompatible, there might be some tension between them. For instance, the preferred set of rights is related to which function of human rights is preferred. If, as the first reading suggests, Cohen endorses the view that human rights provide a set of limits on internal sovereignty, then this view favors a restrictive list such as Rawls's. On the other hand, in line with the global scope of the second reading, Cohen also speaks of human rights as part of the content of an ideal global public reason. Such conceived human rights have a broader role than that of determining standards of legitimate intervention. Hence, Cohen is ambiguous about which is the proper function of human rights in his account but this does not deny the possibility that these two functions can work in tandem.

Another conception I want to consider here is Mathias Risse's conception of human rights as membership rights in the global order.²⁶⁹ After making a distinction between *basis-driven*, *list-driven* and *principle-driven* conceptions of human rights, Risse sketches a basis-driven conception, the basis being "*membership in the global and economic order*."²⁷⁰ He argues that

²⁶⁶ Cohen, "Minimalism about Human Rights," 197.

²⁶⁷ Ibid.

²⁶⁸ Baynes, "Toward a Political Conception of Human Rights," 283.

²⁶⁹ See Risse, "A Right to Work? A Right to Leisure?"; Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint."

²⁷⁰ In Risse's words: "I call conceptions that start with a list of rights *list-driven*, those that start with some specification of the basis on which they are held *basis-driven*, and those that so use some principle generating a

the membership in the global order is the *basis* on which individuals hold human rights and the set of rights people hold in virtue of being such members is partially generated from the standpoint of the collective ownership of the earth.²⁷¹ According to Risse's egalitarian interpretation of common ownership of the earth (details of which I omit here) human beings, no matter when and where they were born, have a moral status of being co-owners of the resources of the earth. The co-ownership rights are pre-institutional natural rights, but the erection of political and economic structures on the commonly owned space requires membership rights (associative rights) to guarantee individuals' ownership rights. The set of human rights is the set of rights we can derive from the demand that the erected political and economic structure does not render individuals incapable of meeting their basic needs, and they thereby preserve their co-ownership status.²⁷²

The defining features of human rights, on this view, are that they are important moral demands against authority which are at the same time also matters of urgent global concern. Risse states:

To argue that X is a human right, what is required in a first, preliminary step is that X be shown to be a matter of urgency in the affected agents' immediate environment, and then, second, that a genuinely global concern be established. (It is hard to imagine that anything could be of global concern for which one could not take that first step, but what is constitutive of X's being a human right on this view is the second.)²⁷³

Risse also underlines that his conception which perceives human rights as membership rights in the global order must be distinguished from Cohen's conception of human rights as membership rights of persons in their respective political society to ensure inclusion. I will not pursue the distinction between the two conceptions, as my main concern is the implications of these conceptions for specific rights claims such as the right to work and the right to housing—a matter to which I will turn in section 3.5.

Without claiming fidelity to the details of different versions, we might say that the main achievement of the political conception is its demonstration that an adequate conception of human rights cannot be derived solely from the moral importance attached to one's humanity without reference to the doctrine and practice of international human rights. The defenders of the political approach do not deny that there are universal moral rights and duties, but they

list as *principle-driven*. (All that is meant by 'principle-driven' is that such a conception is guided by some idea of what ought to be on the list of human rights other than the specification of a basis; the primary example is a specification of their function in international politics.)" Risse, "A Right to Work? A Right to Leisure?," 17.

²⁷¹ Risse, "Common Ownership of the Earth as a Non-Parochial Standpoint," 285.

²⁷² This implication relies on Risse's argument that co-ownership status entails access to resources for securing basic needs the details of which I do not discuss here.

²⁷³ Risse, "A Right to Work? A Right to Leisure?," 22–23.

emphasize that we are not referring to them when we speak of human rights in the modern context. Although it offers an interesting basis for defining rights as human rights, the political conception too faces certain difficulties to which I will turn in section 3.6. Before that, I will examine in what sense this conception of human rights is *political* and how it differs from the naturalistic conception.

3.4 Human rights: *political* not metaphysical, moral or philosophical

As with the naturalistic conception, there are different versions of the political conception of human rights. In this section I would like to reflect on what makes them all *political* conceptions, in other words distil their common features.

Firstly, the political conception does not start from a philosophical or moral conception of the human person to understand what human rights mean. Rather it starts from practice, from a human rights phenomenon, and engages in the philosophical interpretation of that practice. The phrase ‘human rights phenomenon’ is used to denote the contemporary situation in which the discourse of human rights gained prominence in political discourse and has become the *lingua franca* of the international community.²⁷⁴ There is a shared conviction among the adherents of the political conception that a proper way of understanding human rights is to conceive them as elements of international practice rather than as natural rights. Secondly, human rights are political in the sense that the type of justification given for them is determined by their *political* role and function in international political practice although there are differences among individual theorists’ understanding of what this role or function consists in. There is another sense of human rights being *political*, which is that they are claims against mainly (though not exclusively) political institutions and their officials. Finally, human rights are understood as connected to the conditions of membership in a political society rather than rights individuals possess simply in virtue of their humanity.

There are also some discussions about how the features of universality, content and justification of human rights are understood within the political conception. There are differences between different versions of the political conception with respect to these issues some of which I have examined in the previous section. Here, I will briefly discuss the

²⁷⁴ To my knowledge, it is Rabossi who coined the term the human rights phenomenon when he stated: “the human rights phenomenon renders human rights foundationalism outmoded and irrelevant”, Eduardo Rabossi, “La Teoría de Los Derechos Humanos Naturalizada,” *Revista Del Centro de Estudios Constitucionales* 5 (1990): 159–175 quoted in Rorty, “Human Rights, Rationality, and Sentimentality,” 116. The expression that human rights is a moral *lingua franca* has been used by Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001), 53; Tasioulas, “The Moral Reality of Human Rights,” 75.

general viewpoint of the political conception with respect to the issues of universality, content and justification of human rights.

Both a naturalistic and a political conception of human rights may conceive human rights to be universal but their way of interpreting the criteria of universality differs. For the naturalistic conception there are some universal human interests that are *essentially* human (e.g. essential features of personhood) that ought to be protected through human rights. But in contrast, according to the political conception, human rights are rights individuals have as members of the global and political order that *ipso facto*, but *contingently*, includes everybody.²⁷⁵ Therefore the naturalistic approach ascribes human rights to all human beings *unconditionally* whereas the political conception ascribes them *contingently* to people living in a specific time and space, i.e. on the basis of specific qualifications such as citizenship, or legal entitlement.

This contingent derivation of human rights affects the *content* of human rights in two apparently opposing ways. On the one hand, there are specific rights that are dependent on the specific historical contexts and conditions in which people live now. And, it does not make sense to think of them being universal in the sense of being timeless, as is immediately clear by looking at some examples of contemporary human rights, for instance, the human right to fair legal process, the human right to take part in government. This has the tendency to inflate human rights because of the associative relationships and conditions people have in modern societies that require certain rights. For instance the so-called economic and social rights, or welfare rights such as “a common entitlement to subsistence or medical care have mostly been added relatively recently to earlier enunciations of human rights, thereby vastly expanding the claimed domain of human rights.”²⁷⁶ Moreover, compared to a Lockean natural rights conception which conceives human rights to be moral rights individuals would have even in a pre-institutional state of nature, a political conception which takes into account the institutional setting embraces a more expansive list of rights than a minimalist account—in which rights are limited to protections of bodily security. On the other hand, if the role of

²⁷⁵ Risse, “A Right to Work? A Right to Leisure?,” 16. For instance, as I examined in the previous section, Risse develops an account that is based on the membership to a global order, whereas Joshua Cohen develops an account based on membership in a defensible domestic order, see Cohen, “Minimalism about Human Rights.”

²⁷⁶ Sen, “Elements of a Theory of Human Rights,” 316. The contingent derivation of human rights does not necessarily inflate right-claims, for instance certain institutions and conditions in a historical context might need room for new rights for their justifiability; e.g. a right to free education might arise in a context where people do not have bonded labor but have free choice of employment in order to secure equality of opportunity. Whereas it can also be the case that some rights claims associated with earlier institutions and conditions vanish, e.g. the rights of a slave-holder. The point I want to make here is merely that there is a tendency for the number of human rights in the list to increase as the institutional setting and conditions of societies evolve such that new rights claims may arise.

human rights is taken to be, within a political conception, the standards of internal sovereignty in order to be a member in good standing of the global society of peoples, this has a *constraining* effect or downward pressure on the list of human rights: the content of human rights is reduced to a list that is broadly shareable by peoples with different worldviews and conceptions of justice.²⁷⁷ This brings us to the matter of what it means for a list of human rights to be broadly shareable, hence to the matter of *justification* of human rights within a political conception.

Recall that Rawls objects to the grounding of human rights on a theological, philosophical or moral conception of the nature of the human person. Then, the question is how human rights are justified within a political conception of human rights. One matter of controversy about the justification of human rights within the political conception is about the interpretation of Rawls's notion of "the fact of reasonable pluralism" and the justification procedure depending on that interpretation. One possible interpretation is to take the word 'fact' in the phrase literally as referring to an empirical matter of having different comprehensive world views and religions. Following this interpretation, the justification of human rights is taken to be finding 'a lowest common denominator' of distinct ethical and religious traditions—an ethical intersection. In order to secure broad shareability, one looks at the various traditions to find where they intersect or overlap on basic values and this lowest common denominator is then presented as the core set of human rights.²⁷⁸ It is frequently acknowledged that the drafters of the Universal Declaration agreed on a list of human rights but they remained silent on the deeper foundations of human rights; every tradition and religion has its own rationales for the same list. As such, Ignatieff argues, the UDHR makes it possible for human rights to become "less imperial" and at the same time "more political."²⁷⁹

However, this lowest common denominator approach leads in the end to an unnecessary substantive minimalism (i.e. a fairly minimal set of basic rights) and to a justificatory strategy that reflects a compromise with existing political powers.²⁸⁰ As Joshua Cohen convincingly

²⁷⁷ Here the background presumption is a widely accepted Rawlsian position that not all rights required by justice are also human rights. A decent society which has a common good rather than a liberal conception of justice may not have democratic rights— and hence be unjust according to a particular conception of justice (e.g. justice as fairness) — nevertheless it may still protect human rights. For more on this see Cohen, "Is There a Human Right to Democracy?," 227–229.

²⁷⁸ See R. J. Vincent, *Human Rights and International Relations* (New York: Cambridge University Press, 1986); Ignatieff, *Human Rights as Politics and Idolatry*.

²⁷⁹ *Ibid.*, 20.

²⁸⁰ Baynes, "Toward a Political Conception of Human Rights," 377.

argues, the aim for broad agreement by appeal to a justificatory minimalism should not be confused with a substantive minimalism about the content of human rights.²⁸¹

Another possible interpretation of the fact of reasonable pluralism is that it is a claim about our (normative) reasoning capacities rather than an empirical fact. According to this interpretation in the absence of coercive institutions, “people will disagree with one another about matters of deep moral and religious value, and this disagreement cannot be chalked up to error or objectionable bias: even people reasoning in good faith and with a commitment to basic principles of sound reasoning, etc., will continue to disagree.”²⁸² This feature of our human condition, Rawls thinks, has important political consequences: in the political arena we need to find a common ground or basis for dialogue rather than a search for truth.²⁸³ And, in Rawls’s understanding, human rights partly constitute this basis for dialogue as being an element of global public reason. Most adherents of the political conception whose accounts I have examined in the previous section conceive human rights as part of the global public reason and normative standards rather than being a matter of an empirical or *de facto* consensus.

In the next section, I will reflect on some implications of the political conception of human rights with respect to the specific rights claims I have focused on: the right to work and the right to housing.

3.5 Is there a human right to work; a human right to housing?

In the previous chapter, reflecting on the implications of the naturalistic conception for the specific rights claims, I argued that the route taken by the naturalistic conception is to first develop a philosophical account of human rights with grounding, justification and content of human rights and then compare it with the main human rights documents. One of the objections by the adherents of the political conception is that the naturalistic conception does not take into account the *practice* of human rights and they argue that a conception of human rights should take the role human rights play in international practice into account. What difference does a political conception of human rights make with respect to the right to housing and right to work, compared with the naturalistic conception? Following the call made by the proponents of the political conception let’s start by looking at the practice of those rights.

²⁸¹ Cohen, “Minimalism about Human Rights,” 192.

²⁸² Baynes, “Toward a Political Conception of Human Rights,” 378.

²⁸³ Ibid.

To start with the right to housing, this right is codified as a human right in article 25.1 of the Universal Declaration of Human Rights which states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right to housing is also included in the International Covenant on Economic, Social, and Cultural Rights (article 11.1), which states that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.²⁸⁴

In order to clarify the meaning and scope of the right to housing as expressed in the International Covenant on Economic, Social and Cultural Rights Covenant, the Committee on Economic, Social, and Cultural Rights (CESCR), the body that monitors this covenant issued its General Comment 4.²⁸⁵ Paragraph 6 of the General Comment 4 states that the right to adequate housing applies to everyone. The phrase “himself and his family” in the UDHR does not refer to any limitation in the right to housing to individuals, female-headed households, or other groups. Furthermore, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status, and enjoyment of this right must not be subject to any form of discrimination (Paragraph 6).

Among other considerations the General Comment 4 draws attention to the connection of the right to housing with the fundamental principles upon which the Covenant is premised (namely, “the inherent dignity of the human person”) and with other rights (paragraphs 7 and 9). It is mentioned that the right to housing should be interpreted in a broad and inclusive sense as the right to live in “security, peace and dignity” rather than a narrow or restrictive sense that equates it with merely having a roof over one’s head or views that see shelter

²⁸⁴ It is important to keep in mind the distinction between the UDHR which is a non-binding document that does not carry formal legal obligations and Conventions (used synonymously with Treaties and Covenants) which are stronger than Declarations because they are legally binding for governments that have signed them. Some other international treaties, declarations and political commitments that address the human right to housing are: International Labour Organization (ILO) Convention No. 97 on Migration for Employment (1949) (article 6iii), Convention Relating to the Status of Refugees (1951) (article 21), Declaration on the Right to Development (1986) (article 8.1), ILO Recommendation No. 115 on Worker’s Housing (1961), European Social Charter (1961) (Part I: article 31; Part II: articles 15(3), 16, 19(4)(b), 23, 30, 31), European Convention on Establishment (1965) (article 2) and European Convention on the Legal Status of Migrant Workers (1977) (articles 6(1), 13).

²⁸⁵ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003). Available at <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm#one> (last visited on 27/02/2014).

exclusively as a commodity. The right to housing is inextricably linked to other fundamental human rights and should be seen in conjunction with other human rights included in the two International Covenants and other international instruments. In addition to the concept of human dignity and non-discrimination, “the full enjoyment of other rights—such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence (and the right to freedom of movement) and the right to participate in public decision-making—is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing” (paragraph 9).

Finally, there are some assistance agencies and NGOs which monitor the global conditions of shelter and implementation of the right to housing such as the United Nations Human Settlements Programme (UN-Habitat), the United Nations Housing Rights Programme (UNHRP), and the Centre on Housing Rights and Evictions (COHRE).

One can infer from this brief overview of the institutional landscape comprised of declarations, regional and international documents and NGOs that there is already an existing practice which takes the right to housing as a human right. This can be observed independently of the question of how effectively it is implemented or exercised. One of the important aspects of the political conception of human rights is to perceive human rights mainly as claims against authorities (mainly states) and national and international institutions which are the main bearers of duties associated with the rights claims. One main line of objection to social and economic rights is what can be called the *claimability* objection.²⁸⁶ According to this line of reasoning, to claim a right there must be identifiable others (either all other individuals or specified others) with corresponding obligations.²⁸⁷ To claim a right one must first specify who the respective duty-bearers are. While it is clear who the duty-bearers are with respect to negative rights (all individuals), it is not clear who are the corresponding duty-bearers with respect to the rights to goods and services.

The claimability objection can be considered as a serious objection to the existence of socio-economic rights if one perceived human rights as natural rights conceived to be existing

²⁸⁶ I will examine objections to socio-economic rights in more detail in section 5.3.

²⁸⁷ See O’Neill, *Bounds of Justice*.

in a pre-institutional state of nature.²⁸⁸ According to this perception, only those rights that do not need any institutional structure for their claimability will count as natural rights. This is the main reason why most natural rights theorists count only what is labelled *negative* rights as natural rights.²⁸⁹ However, if one perceives human rights within an institutional framework like the political conceptions do, then one does not need to claim in advance that social and economic rights are not human rights (based on the arguments such as that they are not claimable or they are not natural rights).²⁹⁰ In as much as political conceptions conceptualize human rights as claims against basic institutions and delineate how the corresponding responsibilities are allocated among the national and international bodies they do not restrict human rights to rights that can be conceived independently of the institutional and legal structure. From the perspective of a political conception, the states are the main duty-bearers to create the institutional structure to secure everyone's access to socio-economic rights. There are also regional and international institutions which advocate, promote and monitor the realization of those rights. Therefore, political conceptions have the advantage over naturalistic conceptions with respect to socio-economic goods as they specify the duty-bearers and can answer objections such as the claimability objection.

If we move to the human right to work, this right is associated with many other interconnected rights such as the human right to protection from forced labor, the human right to adequate, safe working conditions, and the human right to freedom of association. The human right to work and human rights of workers are included in many human rights documents including the Universal Declaration of Human Rights (Articles 4, 20, 23, 24, and 25), International Covenant on Economic, Social and Cultural Rights (Articles 6, 7, 8, 9, 10, 11), the ILO Equal Remuneration Convention (No. 100), the ILO Discrimination (Employment and Occupation) Convention (No. 111), the ILO Minimum Age Convention (No. 38), the ILO Freedom of Association and Protection of the Right to Organize Convention (No. 87), the ILO Right to Organize and Collective Bargaining Convention (No. 98), the ILO Forced Labour Convention (No. 29) among others. The rights related to work are listed in the Universal Declaration as such:

²⁸⁸ As explored in the chapter 2, there are various ways of conceptualizing natural rights; the notion of a right existing in a state of nature is one way of conceiving of such a right.

²⁸⁹ In the old natural law school only negative rights which have correlative negative duties are natural rights. A negative right is a right not to be subjected to an action and it implies that all other people have negative duties to avoid certain actions. For instance, liberty rights defined as a negative right with the duty of non-interference on all others.

²⁹⁰ As I will examine in section 5.3.2, there can be various objections of this sort like socio-economic rights are not of prominent importance, not practically feasible or that they are not real rights.

No one shall be held in slavery or servitude. . . . Everyone has the right to freedom of peaceful assembly and association. . . . Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests. Everyone has the right to rest and leisure, including reasonable limitation of working hours. . . . Everyone has the right to a standard of living adequate for the health and well-being of himself and his family . . . and the right to security in the event of unemployment, sickness, disability . . . or other lack of livelihood-- Universal Declaration of Human Rights (Articles 4, 20, 23, 24, and 25).

Current labor rights scholarship generally divides labor rights into two categories: *fundamental human rights* (the right to life; to protection against forced labor; to protection from the worst forms of child labor; and freedom of association) and other *labor standards* (wages; benefits; health and safety; and other working conditions deemed economic and social in nature).²⁹¹ As I mentioned in the first chapter, with respect to labor rights practice, the human rights movement and the labor movement followed different tracks: the human rights movement focuses on fundamental human rights related to work, whereas the labor movement focuses on labor standards with a greater emphasis on freedom of association and collective bargaining.

There are various views about the differences and convergences of human rights and labor rights both conceptually and practically. Some scholars argue that they are conceptually different in at least three ways. These three differences are the ways 1) they engage with and conceptualize the state and the private sphere, 2) the individual and the collective and 3) processes versus outcomes.²⁹² The first important distinction between labor and human rights is that, although there is a growing body of literature that explores the application and scope of human rights in relation to non-state actors, human rights, by and large, regulate and apply to the relation between states and individuals whereas labor rights generally require state intervention in the private sphere. Another key difference is that the unit of analysis for human rights is the individual, i.e. the individual is taken as the primary subject. Labor rights, on the other hand, particularly freedom of association, emphasize the collective as the means of individual emancipation. The freedom of association serves to “self-actualize the individual, but it does so through the collective.”²⁹³ This focus on the collective rights matters, Kolben argues, because the rights to freedom of association and collective bargaining are linchpins in the labor rights canon as the ILO made clear in the Fundamental Declaration.

²⁹¹ Hertel, “Human Rights and the Global Economy,” 287.

²⁹² Kolben, “Labor Rights as Human Rights.”

²⁹³ Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven and London: Yale University Press, 1992), 34 quoted in Kolben, “Labor Rights as Human Rights,” 471.

This is so because a central objective of workplace law is workplace democracy.²⁹⁴ The third way in which labor rights and human rights differ is that labor rights are conceptualized *procedurally*. The fundamental aspect of core labor rights is to facilitate a *process* of organizing and negotiating over work conditions; they provide a legal right for workers to form a collective that can negotiate work conditions against the background of state-prescribed minimal standards. Human rights, on the other hand, do not possess the qualities of collective mobilization rights. Rather, they are likely to be legalistic guarantees of individuals in relation to the state. The *process* perspective of labor rights aims for contexts in which workers can collectively act toward obtaining their desired outcomes, a human rights perspective often focuses on the *outcomes* themselves.²⁹⁵

On the other hand, there are scholars who argue that human rights and labor rights are conceptually linked and labor rights should be brought into the mainstream of human rights theory.²⁹⁶ While I leave the discussion of the availability and effectiveness of human rights discourse for securing labor rights (including the right to work) to chapter five, for the moment I will briefly reflect on the implications of the political conception of human rights with respect to labor rights. Among different accounts I have examined in section 3.3, only Risse's account encompasses a right to work and labor rights.

According to Risse's membership account of human rights, in order to secure the co-ownership status of individuals, states should make sure that individuals are capable of meeting their basic needs. And if it is the case that it is hard for individuals to satisfy their basic needs without participation in the formal economy in their respective society, we could then obtain "an elementary right to education and also a right to labor in the sense of those rights as protections against exclusion from labor markets."²⁹⁷ However, the list of rights obtained from Risse's account does not include the full range of labor rights, such as right to join trade unions, or to enjoy just and favorable conditions of employment. Risse argues that it is hard to imagine circumstances under which an individual's ability to satisfy basic needs actually depends on their ability to join a trade union or enjoy just and favorable conditions of employment and therefore those rights would not be of global concern as far as the standpoint of collective ownership is concerned.²⁹⁸ Hence, in Risse's view there is a human right to

²⁹⁴ Ibid.

²⁹⁵ Ibid., 471–472.

²⁹⁶ See for instance Hertel, "Human Rights and the Global Economy,"; Compa, "Labor's New Opening to International Human Rights Standards."

²⁹⁷ Risse, "A Right to Work? A Right to Leisure?," 36.

²⁹⁸ Ibid. This is the only argument Risse gives against the right to trade unions and right to just conditions of employment. To put it differently, he argues that to have their basic needs met individuals do not need to join

freedom from obstructions to entering the labor market but neither association and collective rights nor rights against the government to create employment. Therefore, his account does not encompass the core labor rights recognized by the ILO as human rights.

In short, the implications we can draw from the political conception of human rights with respect to the right to housing and the right to work can be summarized as follows. A political conception of human rights would count the right to housing as part of a right to a minimum standard of living and the right to work if it is the case that conditions in societies make work the most effective and necessary means to secure basic needs. This would mean a contingent derivation of these specific rights; they are contingent on the institutions and contexts of modern societies. The political conception also draws attention to the allocation of duties associated with rights and their inscription in national and international law. Yet, the political conception does not provide a justification of human rights and an explanation of how human rights bear the normative force they have. Moreover, most versions of the political conception arrive at a list of human rights which does not include a full list of liberal rights as human rights. They argue, for instance, that there is not a human right to democracy. This conceptualization radically differs from, for instance, an account of human rights which take human rights and democracy to be co-original such as Habermas's—to which I will turn in the chapter 4. In the first instance, such a separation of democratic rights from human rights on the part of the political conception seems not to be accounting for the *process* role of labor rights which I mentioned above, namely the commitment to economic justice and workplace democracy that have long underpinned labor rights thought and practice.

3.6 Objections to the political conception

By seeing human rights having primarily an international political and legal existence, the political conception leaves the moral justification of human rights open. The political conception seems to provide only a *formal* rather than a *substantive* account of human rights. A formal account gives the criteria for distinguishing human rights claims from those that are not human rights claims. A substantive account, by contrast, provides criteria for generating the content of human rights.²⁹⁹ The accounts of human rights by Rawls, Beitz, Raz and Cohen do not give a substantive account of human rights. They only provide what we may call a

trade unions or enjoy just conditions of employment. For Risse, from the standpoint of global ownership, what is required is that everybody has their basic needs met and the way these are met or further improvements are secondary to this. However, from the viewpoint of the labor rights movement, the freedom of being able to determine and control the conditions of work, an idea of workplace democracy, is also essential.

²⁹⁹ Liao and Etinson, "Political and Naturalistic Conceptions of Human Rights," 347.

formal interventionist account. In their view what makes a right a human right is if violations of the right under some conditions (e.g. when the violation is on a mass scale) give *pro tanto* reasons for intervention. Therefore, political accounts are not sufficient to generate the content of human rights and they need to rely on naturalistic conceptions in order to generate a list of human rights.

Although some defenders of the political conception like Beitz do not deny the possibility that some values can play a foundational role in the account of the basis of individual human rights, others like Raz claim that human rights are not grounded in a fundamental moral concern but are dependent on the contingencies of the current system of international relations.³⁰⁰ But such a position of Raz would run the risk of being ‘political in the wrong way’, a mere *modus vivendi* lacking moral authority.³⁰¹ If proponents of the political approach defend looking at international practice as a heuristic starting point in the process of discovery of an appropriate list of human rights, Gilabert argues, it is not an objectionable demand. But if “the practical view tells us, more ambitiously, that international practice already provides the justification of any such lists”, then it would risk sliding into an obviously problematic form of conventionalism.³⁰²

Although not all defenders of the political view are willing to pay the price of non-foundationalism like Raz (namely leaving the standards of human rights to the contingencies of the current system of international relations), all political approaches, in line with Rawls, focus on the role of human rights in limiting sovereignty in the international realm. Hence the focus shifts from the ‘essentially human’ to the standards of legitimate sovereignty in the practical or political approach. This focus on the political-legal function of human rights in international law also poses some problems. As Forst argues:

It is generally misleading to emphasize the political-legal function of such rights within international law (or political practice) of providing reasons for a politics of legitimate intervention. For this is to put the cart before the horse. We first need to construct (or find) a justifiable set of human rights that a legitimate political authority has to respect and guarantee, and then we will ask what kinds of legal structures are required at the international level to oversee this and help to ensure that political authority is exercised in that way. Only after we have taken that step will it become necessary to think about and set up legitimate institutions of possible intervention (as measures of last resort). *The first*

³⁰⁰ Beitz, *The Idea of Human Rights*, 138 n.10; Raz, “Human Rights Without Foundations,” 336. As is apparent from the title “Human Rights without Foundations”, Raz’s account is anti-foundationalist.

³⁰¹ “Political in the wrong way” is a phrase coined by Rawls in a different context, John Rawls, “The Domain of the Political and Overlapping Consensus,” in *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 491.

³⁰² Gilabert, “Humanist and Political Perspectives on Human Rights,” 446.

*question of human rights is not how to limit sovereignty from the outside; it is about the essential conditions of the possibility of establishing legitimate political authority.*³⁰³

Forst draws attention to an important problem of the political-legal views on human rights. The focus on the role of human rights as that of setting limits to sovereignty and standards for legitimate intervention misses the intranational purpose of human rights, namely their role in setting standards of *internal* political legitimacy.³⁰⁴ This misplaced perspective of the political-legal views of human rights usually results in their defending minimalist conceptions of human rights (reducing the list of human rights to the lowest common denominator) as a broad list of human rights can serve to justify a wide range of interventions.³⁰⁵ In this sense they perceive the role of human rights to be mainly putting constraints on the power relations between states and are merely focused on inter-state relations. They ignore or downplay the role of human rights in establishing internal legitimation of political systems as well as their putting constraints on the power relations in the processes of state and policies formation.

Forst argues that “one must be careful not to assume the role of an international lawyer or judge who presides over certain cases of human rights violations and who at the same time wields global executive power.” The primary perspective of human rights is *from inside*; human rights provide reasons for arranging a social and political structure in the right way; they do not provide concrete specifications of the arrangements of a society.³⁰⁶ They have a role in setting standards of *internal* political legitimacy; in establishing internal legitimation of political systems as well as their role in setting standards for state and policies formation. This is especially important for understanding the real-life rights struggles which I examined in chapter 1, because for the participants in these struggles, the primary perspective of human rights is from *inside*; human rights provide *reasons* for demanding the power to be involved in the arrangement of the social and political contexts they are concerned with.

3.7 Conclusion

In the last two chapters, I examined two stylized views on human rights in the philosophical literature: the naturalistic conception and the political conception of human rights. I examined

³⁰³ Forst, “The Justification of Human Rights,” 726, emphasis added.

³⁰⁴ Most versions of the political conception, as I mentioned, deny that there is a human right to democracy.

³⁰⁵ For instance, Michael Ignatieff defends a ‘minimalist’ view about the content of human rights. He claims that minimalism about human rights is “the most we can hope for”, Ignatieff, *Human Rights as Politics and Idolatry*, 173. According to Ignatieff, we should be most concerned to defend only a limited set of rights connected with bodily integrity and freedom from violence and direct coercion. Although Beitz criticizes minimalist views of human rights, his own critique of human rights to democratic institutions indicates the reductivist tendency in practical approaches.

³⁰⁶ Forst, “The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,” 727–729.

various versions of each conception with complex disagreements among them as well as the different philosophical commitments of each. I also reflected on the implications of each conception for the cases of the right to housing and the right to work.

This dichotomous view within the mainstream of human rights theory—the perception of the naturalistic conceptions contrary to the political conception—can be misleading. There have been some recent attempts that challenge this stark opposition between naturalistic and political perspectives on human rights. Some scholars, for instance, have argued that these two conceptions are complementary and a reconciliatory perspective needs to be developed.³⁰⁷ Some scholars claimed that the two conceptions are about different things and what caused this dichotomy is that defenders of each conception claimed to have provided *the* conception of human rights.³⁰⁸ I also believe that the polarization in the human rights literature between naturalistic and political approaches is not fruitful and different strands of thought should be incorporated into the mainstream of human rights theory. The democratic approach which I will defend in chapter 6 aspires to motivate such an opening to different strands of thought such as discourse-theoretic accounts of human rights and agonistic theories of democracy. In my view, if one has the purpose of accounting for the struggle aspect of human rights and their role in democratic politics, one needs to move beyond the opposition between naturalistic and political approaches. In the next chapter, I will examine discourse-theoretic accounts of human rights as a starting point to go beyond this opposition.

³⁰⁷ Liao and Etinson, “Political and Naturalistic Conceptions of Human Rights,”; Gilabert, “Humanist and Political Perspectives on Human Rights.”

³⁰⁸ Buchanan, for instance, argued that most of the mainstream Anglo-American philosophers have been *conceptual imperialists* when it comes to human rights; they have assumed that their concept of human rights is *the* concept of human rights. Political and practical theorists assert that human rights *are* rights that serve to limit sovereignty in the context of the state system. Orthodox or Moral theorists assert that human rights *are* rights that people have simply by virtue of their humanity and conclude that human rights do not presuppose a state system. Philosophers routinely use the phrase human rights without making it clear if they are talking about moral human rights or international legal human rights, Buchanan, *The Heart of Human Rights*, 10–14.

4 The Discourse-Theoretic Conception of Human Rights

4.1 Introduction

In previous chapters, I have argued that the mainstream philosophy of human rights is dominated by two stylized views. On the one hand, there is the naturalistic conception of human rights which perceives the nature and foundation of human rights without reference to their embodiment in law and politics. It emphasizes the moral aspect of human rights at the cost of ignoring their political aspect (Chapter 2). On the other hand, the political conception of human rights perceives the nature of human rights to be setting the standards of international law and politics. In this way, the political conception takes the political role of human rights into account but it leaves the question about the moral justification of human rights open and unaddressed. Moreover, within the political conception the main role of human rights is understood to be one of setting the standards of legitimacy from the outside, thereby ignoring the role of human rights in the constitution of internal legitimacy (Chapter 3).

Recently some scholars have argued that naturalistic and political conceptions of human rights are complementary rather than opposing views. Liao and Etinson, for instance, have offered a conciliatory perspective on the ongoing debate between proponents of the two conceptions. They argue that since the formal features of the two conceptions seem to be concerned with different things (political conceptions are concerned with the issue of *duty-bearers* of human rights and naturalistic conceptions are concerned with the *grounds* of human rights), it is in principle possible that the two conceptions are compatible.³⁰⁹ They also argue that the two conceptions are not only compatible but because of the fact that political conceptions offer only a *formal* account of human rights they need to rely on a *substantive* naturalistic account for the determination of the content of human rights.³¹⁰ Like Liao and Etinson, Gilibert also calls for a shift from framing naturalistic and political approaches in a contrasting way to understanding them in a complementary way.³¹¹ He suggests that we need both approaches to make good normative sense of the contemporary practice of human rights.

³⁰⁹ Liao and Etinson, "Political and Naturalistic Conceptions of Human Rights," 343.

³¹⁰ Ibid., sec. VI.

³¹¹ Gilibert, "Humanist and Political Perspectives on Human Rights." Gilibert calls "humanist conception" what is usually called naturalistic conception. I will continue to use the term naturalistic to be consistent throughout this dissertation.

Part of my motivation in this chapter is to join Liao and Etinson and Gilabert in their attempt to move beyond this dichotomous view of human rights within the mainstream philosophical literature (naturalistic *versus* political approaches). Nevertheless, my strategy is different than theirs in the sense that I analyze a third conception of human rights, namely the discourse-theoretical model of human rights. Discourse-theoretic conceptions of human rights, as I will demonstrate, already account for ‘the dual nature’ of human rights—their being simultaneously moral and political—within a single understanding of human rights. Therefore, discourse-theoretic accounts can suggest a more systematic perspective to find a middle-ground between naturalistic and political conceptions of human rights than other reconciliatory attempts that look for different naturalistic and political theories and argue for their combination.³¹²

Those sympathetic to Habermas’s discourse-theory of morality have recently sought to extend his work into an account of human rights which can be called a discourse theory of human rights.³¹³ Seyla Benhabib and Rainer Forst, for example, have independently provided accounts of human rights from a discourse-theoretic perspective.³¹⁴ As Baynes argues, we can delineate a three-stage construction in the accounts of Forst and Benhabib:

- 1) The identification of ‘the speech-act-immanent obligation’³¹⁵ of speakers and hearers to provide reasons in support of the validity claims they make,

³¹² Although I will not go into detail here, I think such an attempt of Liao and Etinson to combine a particular version of the naturalistic conception (i.e. Griffin’s conception of normative agency) with a political conception does not work if one takes the ordinary moral reasoning objection of Rawls seriously. This is because, as I have argued before, Griffin’s ethical justification of human rights based on the notion of agency is biased towards one conception of the good life (i.e. the life of the self-chooser). The gist of Rawls’s ordinary moral reasoning is to avoid justifications of this sort given the role human rights play in international law, namely of determination of the limits of legitimate sovereignty.

³¹³ The development of a discourse-theoretic conception of human rights can also be seen, as Jeffrey Flynn does, as an extension of the Rawls-Habermas debate into the philosophy of human rights within which Rawlsians work on the political conception of human rights whereas Habermas and others have developed a discourse theory of human rights. See, Jeffrey Flynn, “Two Models of Human Rights: Extending the Rawls-Habermas Debate,” in *Habermas and Rawls: Disputing the Political*, ed. Finlayson James Gordon and Fabian Freyenhagen (New York: Routledge, 2011), 247–64. Although I will not go into the details of the so-called Rawls-Habermas debate here, I will refer, when relevant, to the basic parameters of this debate for the question of how a philosophy of human rights ought to be worked out.

³¹⁴ Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity, 2011); Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004); Forst, “The Basic Right to Justification”; Forst, “The Justification of Human Rights.” Some other discourse-theoretic conceptions of human rights are James Bohman, *Democracy Across Borders* (Cambridge, MA: MIT press, 2007); Eva Erman, *Human Rights And Democracy: Discourse Theory And Global Rights Institutions* (Aldershot: Ashgate Publishing, 2005).

³¹⁵ The notion of ‘speech-act immanent obligation’ is a notion in Habermas’s theory of communicative action which is connected to the normative basis of speech; when agents speak they engage in a structure of mutual speech-act-immanent obligation to provide justification for the different sorts of claims they make. Simply by the virtue of engaging in communicative action every actor implicitly recognizes this obligation, hence the obligation is ‘immanent’ to speech acts.

- 2) Implication of a basic moral right—‘the moral right to justification’ (Forst), or ‘the right to have rights’ (Benhabib),
- 3) This basic moral right (Forst) or ‘moral principle’ (Benhabib) is connected with a more extensive set of human rights.³¹⁶

A discourse-theoretic conception of human rights provides an *intersubjective moral* justification of human rights. Moreover, it gives a systematic account of how moral and political considerations are integrated into one conception of human rights. The proposed elements and aspects of the discourse-theoretic conception that I will examine in this chapter make it a viable conception of human rights that transcends the opposition between the naturalistic and political conception.³¹⁷

The democratic account of human rights, which I am constructing and defending in this dissertation (see chapter 6), is a modification of a discourse-theoretic conception of human rights—especially Forst’s account of human rights. In order to motivate my modification of the discourse-theoretic conception of human rights, in this chapter, I will closely examine discourse-theoretic conceptions of human rights, starting from an analysis of the basic influences of Habermas’s discourse theory of morality and his own work on human rights (section 4.2) followed by an examination of two recent versions pursued by Benhabib and Forst (sections 4.3 and 4.4). After this exposition of contemporary discourse-theoretic accounts, I will examine the implications of a discourse-theoretic conception for the justification of socio-economic rights as human rights, given the emphasis in this dissertation on struggles for socio-economic rights in particular (section 4.5). I will also argue that discourse-theoretic accounts fare better than the naturalistic and political conceptions in accounting for the struggle aspect of human rights. In section 4.6, I will discuss some of the most important objections directed to discourse-theoretic approaches.

4.2 Habermas on human rights

Habermas’s work on human rights has taken shape across a number of texts and it has at least two elements: 1) a rational reconstruction of the system of rights within constitutional democracies, 2) an analysis of the dual nature of human rights in relation to law and morality.

³¹⁶ Baynes, “Discourse Ethics and the Political Conception of Human Rights,” 3.

³¹⁷ Some scholars argue that discourse-theoretic approaches are not very different from political approaches and can be considered a version of the political approach, see for instance, *Ibid.*, 3–6. I believe that despite the similarity between discourse-theoretic accounts and political accounts in rejecting a conception of human rights as natural rights, discourse-theoretic accounts radically differ from political conceptions in at least two aspects: discourse-theoretic accounts differ from political accounts since they i) connect the legitimacy of human rights to democratic deliberation and consensus and ii) offer a systematic moral justification of human rights (this is the especially the case for the accounts of Benhabib and Forst).

In the following, I will examine Habermas's approach to human rights with respect to (1) and (2).

4.2.1 The rational reconstruction of the system of rights

In *Between Fact and Norms*, Habermas offers a sociologically informed conceptualization of law and basic rights that goes beyond the dichotomies that have been inflicted on political theory. The first dichotomy is the one between human rights (private autonomy) which is prioritized by classical liberal views and popular sovereignty (public autonomy) which is prioritized by civic republicanism in grounding legitimacy. Classical liberal views, stemming from thinkers like John Locke, tend to define legitimate government in relation to the protection of individual liberties, often specified in terms of human rights. According to these views, citizenship or participation in the political community is seen as valuable only instrumentally; as a means of securing individual rights and opportunities. Republican views influenced by thinkers such as Jean-Jacques Rousseau, on the other hand, tend to ground legitimacy of government in notions of popular sovereignty emphasizing the importance of shared traditions, civic autonomy and an idea of the common good. On this view, individual rights and opportunities that the subjects enjoy derive from and depend on the values and ideas of the political community.³¹⁸ In arguing for an 'internal relation' between private and public autonomy by providing an account of legitimate law in which both human rights and popular sovereignty play separate roles, Habermas aims to move beyond this dichotomy between civic republicanism and classical liberalism.³¹⁹

Habermas's strategy for providing such an account is to anchor the legitimacy of law in a *discourse principle* (D):

D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.³²⁰

Each type of practical discourse involves a further specialization of the discourse principle (and corresponding sorts of reasons) depending on the question at issue. For the justification of moral norms, the discourse principle takes the form of a

³¹⁸ David Ingram, *Habermas: Introduction and Analysis* (Yale University Press, 2010), 111.

³¹⁹ William Rehg, "Translator's Introduction" in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: The MIT Press, 1996), xxv–xxvi. I will analyze the 'internal connection' between human rights and popular sovereignty, in more detail, in section 6.2.

³²⁰ *Ibid.*, 107.

universalization principle:

U: A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value orientations for *each individual* could be *jointly* accepted by *all* concerned without coercion.³²¹

According to discourse principle, a law may claim legitimacy only if all those possibly affected could consent to it after participating in ‘rational discourses’:

As participants in “discourses,” we want to arrive at shared opinions by mutually convincing one another about some issue through arguments, whereas in “bargaining” we strive for a balance of different interests. . . . Now, if discourses (and bargaining processes) are the place where a reasonable political will can develop, then the presumption of legitimate outcomes, which the democratic procedure is supposed to justify, ultimately rests on an elaborate communicative arrangement: the forms of communication necessary for a reasonable will-formation of the political lawgiver, the conditions that ensure legitimacy, must be legally institutionalized. *The desired internal relation between human rights and popular sovereignty consists in this: human rights institutionalize the communicative conditions for a reasonable political will formation.*³²²

Hence the aimed internal connection between popular sovereignty and human rights, according to Habermas, lies in the normative content of the very “*mode of exercising political autonomy*” which is secured through the communicative form of discursive processes of opinion- and will-formation.³²³ When the co-originality of private and public autonomy is revealed in discourse-theoretic terms (according to which addressees of laws are simultaneously the authors of their rights), then the substance of human rights is perceived to be residing in the formal conditions for the legal institutionalization of the discursive processes of opinion- and will-formation. According to this reconstruction, public and private autonomy mutually presuppose one another rather than one being prior to the other.

By anchoring the legitimacy of law in the discourse principle, which is conceptually prior to the division between morality and law, Habermas aims to move beyond another dichotomy in the legal sphere between a normative conception of law (i.e. natural rights and natural law conceptions) and a normatively neutral conception of law which we find in legal

³²¹ Although I cannot go into detail here, Habermas’s principle of discourse (D) and its moral form (U) rely on his pragmatic theory of meaning and theory of communicative action. The idea is roughly that starting from general presuppositions of argumentation (‘rules of discourse’) as the reflective form of communication, one can arrive at a dialogical equivalent of Kant’s Categorical Imperative. For attempts to derive the universalization principle from rules of discourse and additional premises in a formal-pragmatic fashion, see William Rehg, “Discourse and the Moral Point of View: Deriving a Dialogical Principle of Universalization,” *Inquiry* 34, no. 1 (1991): 27–48; James Gordon Finlayson, “Modernity and Morality in Habermas’s Discourse Ethics,” *Inquiry* 43, no. 3 (2000): 319–340.

³²² Jürgen Habermas, “Remarks on Legitimation through Human Rights,” in *The Postnational Constellation*, trans. Max Pensky (Cambridge, MA: MIT Press, 2001), 116–117, emphasis added.

³²³ Habermas, *Between Facts and Norms*, 103.

positivism.³²⁴ Law has a dual character: it has both a factual side (as a system of coercible rules and procedures it has an existence similar to social facts) and a normative side (laws embody a claim to legitimacy; they appeal to reasons that all citizens, ideally, find acceptable).

Habermas claims that the “system of rights” for constitutional democracies can be reconstructed by the “interpenetration of the discourse principle and the legal form” and this interpretation is understood as a “*logical genesis of rights*” by Habermas.³²⁵ Some further clarification may be needed here. The idea of a *logical* genesis refers to the notion of a conceptual reconstruction rather than a *historical* depiction of the actual process of constitutional rights-making. It is an elaboration of the conceptual presuppositions of an idea of a legitimate legal system and a reconstruction of the rights inscribed within this legal system. The discourse principle (D) expresses “the post-conventional requirements of justification”, namely, the requirement of impartiality.³²⁶ According to Habermas, under the conditions of post-metaphysical thinking, the need for justification cannot be met by ethical deliberations which are oriented to the telos of my/our good (or not misspent) life but rather by impartial evaluations of *moral* discourses.³²⁷ The discourse principle (D) embodies this moral viewpoint of equal respect for each person and equal consideration for the interests of all. Finally, the ‘*legal form*’ consists in this: “Modern states are characterized by the fact that political power is constituted in the form of positive law, which is to say: enacted and coercive law.”³²⁸ The legal form refers to Habermas’s functional concept of modern law which is roughly the idea that in post-traditional morality, the backing of a shared religious or metaphysical standpoint for regulation and organization in societies is no longer possible. Habermas makes a sociological argument that due to its formal characteristics law complements post-traditional morality in fulfilling integrative functions for society.³²⁹ According to the discourse-theoretic justification of Habermas, this genesis of rights occurs in two-stages: The first level involves a philosophical deduction of basic

³²⁴ Flynn, “Two Models of Human Rights,” 252.

³²⁵ Habermas, *Between Facts and Norms*, 121.

³²⁶ *Ibid.*, 107.

³²⁷ *Ibid.*, 97.

³²⁸ Habermas, “Remarks on Legitimation through Human Rights,” 114.

³²⁹ These formal characteristics are that “law is positive, coercive, reflexive and individually actionable”, Jeffrey Flynn, “Habermas on Human Rights: Law, Morality, and Intercultural Dialogue,” *Social Theory and Practice* 29, no. 3 (2003): 435. On the formal characteristics of law and the complementary relation between institutionalized legal system and post-conventional morality, see Habermas, *Between Facts and Norms*, 111–118. I do not presume that the discourse principle, the legal form and the way they interpenetrate are uncontroversial. Nevertheless, I restrict myself here to a clarification and exposition of Habermas’s position on human rights, especially of his reconstruction of the system of rights from the discourse principle and legal form only.

categories of rights from the functional concept of modern law (legal form) and the normative idea of rational justification (the discourse principle), thus securing the minimal liberal requirement (the rule of law in which rights apply to everyone equally).³³⁰ The second level involves the political process of turning (or interpreting) these abstract principles of rights into a system of rights in accordance with the principle of democracy.³³¹ This reconstruction of rights in a stepwise fashion is summarized by Habermas as follows: “One begins by applying the discourse principle to the general rights to liberties—a right constitutive for the legal form as such—and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy.”³³² In connection with this strategy, Habermas introduces five categories of basic rights:

- 1) Basic rights that result from the politically autonomous elaboration of the right to equal *individual* liberties (these cover subjective liberties of freedom of speech, freedom of conscience, and the person);
- 2) Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law (rights to association);
- 3) Basic rights that result immediately from the *actionability*³³³ of rights and from the politically autonomous elaboration of individual *legal protection* (rights to legal protection, free trial and due process, and so forth);
- 4) Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law (rights to public offices);
- 5) Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in 1 through 4 above (rights to welfare and other (material) conditions).³³⁴

Two aspects of Habermas’s reconstruction of the system of rights are crucial for the discussions about the specific content of rights. First Habermas reconstructs a *system* of rights

³³⁰ Ingram, *Habermas: Introduction and Analysis*, 168.

³³¹ ‘The principle of democracy’ is the legal institutionalization of the discourse principle. It states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted. Tailored to legal norms, the principle of democracy, Habermas claims, should establish a procedure of legitimate law-making and it must also steer the production of the legal medium itself, Habermas, *Between Facts and Norms*, 110–111.

³³² *Ibid.*, 121.

³³³ ‘Actionability’ refers to legal enforcement of rights and remedies for the violation of rights. For Habermas a legal norm’s validity implies its legal enforcement.

³³⁴ *Ibid.*, 122–123.

such that different categories of rights are internally linked and intermingled. Second, there are five *categories* of basic rights; the specific content of each category is determined by the citizens themselves.

4.2.2 The dual nature of human rights

In *Between Fact and Norms*, Habermas argues that the connection between democracy and human rights is not a historically contingent but a conceptually ‘internal’ one: human rights legally institutionalize the communicative conditions for reasonable political will-formation.³³⁵

Although Habermas offers a reconstruction of the system of rights within constitutional democracies in *Between Facts and Norms*, in his recent works he has addressed the issue of international human rights.³³⁶ In this respect, he examines the objections to international human rights from Western and non-Western perspectives and explores the potentials of the system of rights for non-Western societies. Here, Habermas argues that human rights are “Janus-faced” with one face turned towards morality and the other, simultaneously, towards law:

Because the *moral promise* of equal respect for everybody is supposed to be cashed out in *legal currency*, human rights exhibit a Janus face turned simultaneously to morality and to law. . . . Notwithstanding their exclusively moral *content*, they have the *form* of enforceable subjective rights that grant specific liberties and claims. . . . Thus, human rights circumscribe precisely that part (and only that part) of morality which *can* be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights.³³⁷

Human rights are then special moral norms that require juridification. In this section, I will critically analyze Habermas’s position on the moral and legal side of human rights to see if his view has the necessary resources to find a middle-ground between the naturalistic and political conceptions of human rights.

In terms of the *moral side* of human rights, Habermas argues that human rights are moral norms and hence they have moral validity. In this context, it is important to distinguish between the *reconstruction* of the system of basic rights and the *moral justification* of human rights. The reconstruction of the system of basic rights, as Flynn argues, shows how to anchor some abstract principles of human rights within the practice of democracy by showing how

³³⁵ Flynn, “Habermas on Human Rights,” 432.

³³⁶ Habermas, “Kant’s Idea on Perpetual Peace”; Habermas, “The Concept of Human Dignity”; Habermas, *Remarks on Legitimation through Human Rights*.

³³⁷ Habermas, “The Concept of Human Dignity,” 470, emphasis original. See also, Habermas, *Remarks on Legitimation through Human Rights*, 118.

they are internal presuppositions of the practice of constitution-making.³³⁸ The rational *reconstruction*, however, cannot be viewed as a complete *moral justification* of human rights. Habermas accepts that human rights are moral norms and hence have universal validity. However, he is not very clear on the justification of human rights. As moral norms they take the form of the principle of universalization (U). The principle of universalization introduces a rule of argumentation for moral norms. But unlike Kant's categorical imperative, the principle of universalization does not rule out considerations of consequences, interests and values within the justification procedure of moral norms.³³⁹ Hence, reasons other than moral reasons such as prudential reasons and instrumental reasons can enter into the justification of a moral norm. Habermas claims that people from different worldviews can agree on a moral principle although their respective reasons can be different.

In this context, one can object that Habermas's approach does not properly account for the moral aspect of human rights. Forst, for instance, raises such an objection when he argues that human rights are something that moral persons must grant one another—rights we *owe* one another, in a moral sense.³⁴⁰ Forst argues that apart from the moral arguments for specific rights *within* the rights-generating process, there is also a moral argument for *entering into* a rights-generating process at all.³⁴¹ He argues for a basic right to justification which I will examine in section 4.4. What is important for now is that Habermas does not provide a moral justification of human rights dependent on moral reasons only.

Another aspect of Habermas's account is the *intersubjective* character of the construction of both moral norms and human rights. As Thomas McCarthy argues, Habermas, like Kant, distinguishes between the types of practical reasoning and corresponding types of 'ought' proper to questions about what is practically expedient, ethically prudent, and morally right. Again like Kant, Habermas understands the type of practical reasoning about what is right and just to be universal in import: "it is geared to what everyone could rationally will to be a norm binding on everyone alike."³⁴² Habermas's discourse theory of morality, however, replaces Kant's categorical imperative with a procedure of moral argumentation in the sense that a

³³⁸ Flynn, "Two Models of Human Rights," 254.

³³⁹ Recall the principle of universalization (U): "A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value orientations for *each individual* could be *jointly* accepted by *all* concerned without coercion", Jürgen Habermas, "A Genealogical Analysis of the Cognitive Content of Morality," in *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, Mass.: The MIT Press, 1998), 43.

³⁴⁰ Forst, "The Basic Right to Justification" 50, emphasis original..

³⁴¹ Flynn, "Habermas on Human Rights," 441.

³⁴² Thomas McCarthy "Introduction" to Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. Cristian Lenhardt and Shierry W. Nicholsen (Cambridge: Polity Press, 1990), vii–xiii.

notion of reasoned agreement among those subject to a norm is centered at the core of the normative justification of the norm in question. Kant's first formulation of the categorical imperative, "the formula of universal law", runs as follows:

Act only according to that maxim by which you can at the same will that it should become universal law (*Groundwork of the Metaphysics of Morals*, 4: 421).³⁴³

While according to Kant's formal criterion of universalization each solitary individual establishes the validity of a moral norm for herself, according to Habermas's dialogical principle of universalization (U) for a norm to be valid, its consequences for the satisfaction of everyone's interests must be acceptable to all as participants in a practical discourse. This shifts the frame of reference from Kant's *monological* procedure of moral reasoning of a solitary, reflecting moral consciousness to the *dialogical* process of reaching consensus within a community of moral subjects.³⁴⁴

About the *legal* side of human rights, Habermas perceives an essential connection of human rights to law. In fact, he claims that human rights circumscribe that part of morality that requires juridification. Habermas asserts: "the concept of human rights does not have its origins in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are juridical *by their very nature*."³⁴⁵ This emphasis of Habermas on juridification has been criticized by Thomas Pogge and Seyla Benhabib.

As discussed in the previous chapter, Pogge emphasizes the importance of institutions for human rights. He argues that human rights are moral claims that require institutional guarantee. However, he argues that institutional guarantee does not need to take the form of legal rights. Pogge defines an understanding of human rights U₃, "according to which human rights are basic or constitutional rights as each state ought to set them forth in its fundamental legal texts and ought to make them effective through appropriate institutions and policies."³⁴⁶ According to Pogge, Habermas's approach to human rights exemplifies U₃, because for

³⁴³ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1998), 31.

³⁴⁴ According to Habermas, this incorporation of a rule of argumentation together with the perspective of real-life argumentation of all those affected differentiates his universalization principle from the one Rawls proposes: "Like Kant, Rawls operationalizes the standpoint of impartiality in such a way that every individual can undertake to justify basic norms on his own", Habermas, *Moral Consciousness and Communicative Action*, 66. This *intersubjective* process of the normative justification of norms is one of the important differences between discourse-theoretic approaches and other approaches of human rights.

³⁴⁵ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge, MA: The MIT Press, 1998), 190, emphasis original.

³⁴⁶ Pogge, "The International Significance of Human Rights," 50.

Habermas included in the meaning of human rights is that they should be enshrined in the system of constitutional rights.³⁴⁷ Pogge argues that this understanding has problems because the requirement of juridification is a strict requirement because particular human rights do not always require juridification. Pogge gives the example of the right to adequate nutrition and argues that a legal right to nutrition will be superfluous in a society that secures adequate nutrition without recourse to the legal system such as through a kinship system of food provision. Therefore, Pogge concludes the juridification component is not really essential to the concept of human rights. I referred to Pogge's criticism of Habermas's understanding of human rights to illustrate one of the problems of those views that subsumes the morality of human rights to their embodiment in a legal order. In the next sections, I will discuss other discourse-theoretic accounts of human rights that account for the political aspect of human rights without subsuming the moral side of human rights to their legality.³⁴⁸

Seyla Benhabib, in a different line of argument, also criticizes Habermas's emphasis on the juridification of human rights. Acknowledging the validity of Habermas's conceptual distinction between private and public autonomy, Benhabib argues that "the 'logical genesis of rights' takes the teeth out of the experience of social struggles in history."³⁴⁹ She argues that the experience of democracy is more complex and there is more historical indeterminacy than Habermas envisages. Moreover, not every democracy or legal system considered legitimate presupposes the kind of classification of rights Habermas postulates. Granted that the *conceptual* co-originality of private and public autonomy can be interpreted as a critique of the individualistic, natural rights construction of rights which places holders of rights outside the polity, it should not be interpreted as a *historical* necessity thereby underestimating the potential conflicts between public and private autonomy.³⁵⁰

³⁴⁷ This is the textual evidence Pogge provides: "The concept of human rights is not of moral origin, but . . . by nature juridical." Human rights "belong, through their structure, to a scheme of positive and coercive law which supports justiciable subjective rights claims. Hence it belongs to the meaning of human rights that they demand for themselves the status of constitutional rights." Jürgen Habermas, "Kants Idee des Ewigen Friedens – aus dem historischen Abstand von 200 Jahren," *Kritische Justiz* 28 (1995), 310, 312 quoted in Ibid., n. 8.

³⁴⁸ Pogge also criticizes a legalistic understanding of human rights as it is vulnerable to the objections that it is ethnocentric and individualist especially from the standpoint of non-Western worldviews. I will examine these sorts of objection and to what degree different conceptions of human rights are vulnerable to these objections in chapter 5. I will also make some remarks on Habermas's views on the universal validity of human rights in the next subsection.

³⁴⁹ Benhabib, *Dignity in Adversity*, 263, n.52.

³⁵⁰ In her review of Habermas's *Between Facts and Norms*, Benhabib argues that even if one does not subscribe to a possessive individualist conception of a right, conceptual and institutional conflicts exist between the protection of basic rights and the exercise of popular sovereignty such as the curtailment of basic rights of 'unpopular' minorities such as sexual or ethnic minorities against the majorities or the curtailment of the basic rights of asylum seekers, foreigners or migrants by parliamentary majorities, Seyla Benhabib, "Review of *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*," *American Political Science Review* 91, no. 3 (1997): 725–726.

In his most recent piece on human rights, Habermas acknowledges that in his previous work he ignored the struggle dimension of human rights. He moves his focus on this aspect of human rights and postulates the notion of human dignity as “the moral “source” from which all of the basic rights derive their meaning.”³⁵¹ He claims that the notion of dignity serves the mediating role between the moral and legal side of human rights. Presenting a conceptual history of the concept of dignity and the role it played in the construction of human rights, he claims that “the social recognition of the dignity of others provides a conceptual bridge between the moral idea of equal respect for all and the legal form of human rights.”³⁵²

[T]he experience of the violation of human dignity has performed, and can still perform, an inventive function in many cases: be it in view of the unbearable social conditions and the marginalization of impoverished social classes; or in view of the unequal treatment of women and men in the workplace. . . . In the light of such specific challenges, different aspects of the meaning of human dignity emerge from the plethora of experiences of what it means to be humiliated and be deeply hurt. The features of human dignity specified and actualized in this way can then lead both to a *more complete* exhaustion of existing civil rights and to the discovery and construction of new ones.³⁵³

Although Habermas proposed a concept of human dignity mediating between the moral idea of equal respect for all and the legal form of human rights, he left aside the question whether this shift in focus has further consequences for the reading of the discourse principle as part of the justification of basic rights. In the following I will examine two approaches to human rights which attempt to provide a discourse-theoretic moral justification of human rights.

4.3 Seyla Benhabib: Democratic iterations

In her various works and most particularly in her book *Dignity in Adversity*, Seyla Benhabib defends a discourse-theoretic account of human rights which synthesizes insights from discourse ethics with the Arendtian notion of ‘the right to have rights’. According to Benhabib, there is one moral right, the right to have rights of every human being, which refers to a right “to be recognized by others and recognize others in turn, as persons entitled to moral respect and legally protected rights in a human community.”³⁵⁴ While Benhabib borrows the notion of the right to have rights from Arendt, contrary to Arendt, she uses it not principally as a *political* right to membership in a political community but rather as a *moral* right to be recognized as a moral being worthy of equal concern and protection. By engaging in what she

³⁵¹ Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights,” 466.

³⁵² Ibid., n. 10.

³⁵³ Ibid., 467–468, emphasis original. This shows how significant Axel Honneth’s recognition theory has become for Habermas’s discourse theory of human rights. In fact, Habermas has added a paragraph in which he explicitly referred to the work of Honneth in the reprint of this article in his book Jürgen Habermas, *The Crisis of the European Union: A Response*, trans. Ciaran Cronin (Polity, 2012), 92.

³⁵⁴ Benhabib, *Dignity in Adversity*, 60.

calls a “presuppositional analysis”, Benhabib attempts to show that we presuppose communicative freedom in any meaningful account of human rights.³⁵⁵ In Benhabib’s view, human rights articulate moral principles that protect the exercise of communicative freedom. Communicative freedom is the capability of saying ‘yes’ or ‘no’ to an utterance whose validity claim the hearer can comprehend and according to which she can act. All potential and actual speakers of a natural or symbolic language have a fundamental right to have rights as a moral being capable of communicative freedom. The exercise of communicative freedom is understood as an exercise of agency within the discourse-theoretic model whereas the individual agents are viewed as an individual embedded in contexts of communication as well as interaction.³⁵⁶

Benhabib notes that discourses, differing from bargaining, coercive manipulation or brainwashing, are dependent on formal conditions of conversation. These conditions are:

the *equality* of each conversation partner to partake in as well as initiate communication, their *symmetrical* entitlement to speech acts, and *reciprocity* of communicative roles - each can question and answer, bring new items to the agenda, and initiate reflection about the rules of discourse itself. These formal preconditions, which themselves require reinterpretation within the discursive process, impose certain *necessary* constraints upon the *kinds of reasons* that will prove acceptable within discourses, but they *never can*, nor should they be required to, provide *sufficient* grounds for what constitute good reasons.³⁵⁷

In order to make the transition from these highly abstract and formal considerations of the right to have rights to specific rights regimes, legal systems and conventions of existing polities, Benhabib suggests the project of “democratic iterations.”³⁵⁸ Democratic iterations are processes of public argumentation, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked throughout legal and political institutions.³⁵⁹ The universal and context-transcending validity of human rights is resituated and reiterated in concrete contexts by democratic iterations. Benhabib argues that ‘democratic iterations’ is a normative concept with empirical import; it posits certain normative criteria to judge macro-processes of discourse and the justification of the criteria is derived from the program of communicative ethics.³⁶⁰

According to Benhabib’s analysis, human rights are not just ethical demands tied to

³⁵⁵ Ibid., 65.

³⁵⁶ This embedded view of agency in discourse-theoretic accounts is one of the main differences from other agency conceptions of human rights such as Griffin’s and Gewirth’s which have a *monological* understanding of agency and justification of human rights in the sense of human rights as universally valid moral norms that are justified from the point of view of a solitary agent.

³⁵⁷ Ibid., 71, emphasis original.

³⁵⁸ See Benhabib, *The Rights of Others*, 179 ff. and Benhabib, *Another Cosmopolitanism* (Berkeley Tanner Lectures), ed. Robert Post (Oxford: Oxford University Press, 2006), pp. 45 ff.

³⁵⁹ Benhabib, *The Rights of Others*, 19.

³⁶⁰ Ibid., 16.

notions of freedom, agency, etc., they also have political character as they are closely tied to claims of legitimacy and just rule. In this sense, like Habermas, Benhabib argues that there is an intrinsic connection between human rights and democratic self-determination.³⁶¹ With respect to the practical conceptions, she argues that rather than limiting the conceptions of human rights to a functional role of their position in international relations and intervention, we should see them as “instruments of *critique*.”³⁶² Universal human rights as one of the most prominent cosmopolitan norms empower local movements.³⁶³ In this sense, Benhabib’s account straddles the divide between the naturalistic and political conceptions of human rights. Yet, her justificatory strategy is not free from critique. Before examining some objections in section 4.6, I will examine one other discourse-theoretic account of human rights provided by Forst.

4.4 Rainer Forst’s constructivist conception of human rights

Recently, Rainer Forst has provided what he names a *constructivist* conception of human rights. Before examining Forst’s account of human rights, I will clarify my usage of the terms constructivist and discourse-theoretic. Forst calls his account of human rights constructivist as it is part of his constructivist account of the source of moral normativity. According to Forst, morality derives its normativity and validity not from God or any other independent source but from itself. So, in this sense Forst’s account is a specific form of Kantian constructivism in which morality is autonomous; it draws its validity from itself. Yet, the validity of moral norms is granted by a procedure of justification. In other words, the moral norms are *constructed* by the procedure of a general and reciprocal justification. Forst formulates the core insight of constructivism as follows: “there is no objective, or in any sense, valid order of values that takes priority over the justification procedure. Only those norms that can successfully withstand this procedure count as valid.”³⁶⁴ I cannot here go into a more detailed

³⁶¹ Benhabib, *Dignity in Adversity*, 74. I will examine this connection between democracy and human rights in more detail in section 6.2.

³⁶² Ibid., 236 n. 29. Benhabib calls the political approaches such as those of Beitz’s and Joshua Cohen’s “the functional conception.” Ibid., 92ff.

³⁶³ Ibid., 118.

³⁶⁴ Forst, *The Right to Justification*, 48. Some other constructivist approaches that Forst mentions are the discourse ethics of Habermas and Karl-Otto Apel, and the constructivist programs of Rawls, Onora O’Neill and Christine Korsgaard. See Habermas, “Discourse Ethics: Notes on a Program of Philosophical Justification”; Karl-Otto Apel, “The A Priori of the Communication Community and the Foundations of Ethics,” in *Towards a Transformation of Philosophy* (London: Routledge, 1980), 225–300; John Rawls, “Kantian Constructivism in Moral Theory,” in *Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999), 303–358; Onora O’Neill, “Constructivisms in Ethics,” in *Constructions of Reason: Explorations of Kant’s Practical Philosophy* (Cambridge: Cambridge University Press, 2000), 206–218; Christine Korsgaard, *The Sources of Normativity* (New York: Cambridge University Press, 1996).

discussion of constructivist positions in moral theory. It is worth noting, however, that to the extent that Forst offers “a moral construction of a conception of human rights” in which the right to justification and the criteria of reciprocity and generality serve as the basis (there is more detail on this below), his account of human rights is a ‘constructivist’ one.

Granted this general constructivist program of Forst’s account of moral normativity, I consider his conception of human rights to be a version of discourse-theoretic conception of human rights. This is because the constructivism Forst proposes is ‘discursive’, the procedure of construction is not a hypothetical thought experiment like Rawls’s original position, rather “a procedure of reciprocal and general argumentation within certain contexts.”³⁶⁵ Moreover, there is a *moral* construction of human rights not just a *political* construction as Rawls proposes. For these reasons, although it is different from Habermas’s view on human rights in the sense of giving a moral justification of human rights, Forst’s account is more similar to a discourse-theoretic conception of human rights than it is to a political conception.³⁶⁶

Forst has provided a reflexive argument for the justification of human rights based on the right to justification. By ‘reflexive’ Forst means “the very idea of justification itself is reconstructed with respect to its normative and practical implications.”³⁶⁷ This idea is similar to what Forst elsewhere calls a ‘recursive analysis’.³⁶⁸ This type of argument states that a normative claim, which has a reciprocal and general validity claim (e.g. a rights claim), has to be justifiable on the basis of criteria presupposed by its claim to validity. This is the *recursive principle of justification*: a moral norm can claim reciprocal and general validity, which means that each person should adhere to this norm as an agent and can demand its observance from all others. “If one asks *recursively* about redeeming this validity claim, then this calls for a *discursive* justification procedure in which the addressees of the norm can assess its reciprocal and general validity, in which the criteria of reciprocity and generality are decisive.”³⁶⁹

In moral contexts of justification, criteria of *reciprocity* and *generality* are essential: the former means that nobody claims special privileges and everyone grants others all the claims one raises for oneself, without projecting one’s own interests, values, or needs onto others and

³⁶⁵ Forst, *The Right to Justification*, 216.

³⁶⁶ Forst describes the difference between his version of the constructivism and Rawls’s constructivism with respect to human rights in *Ibid.*, 216–217. Some other scholars who call Forst’s account discourse-theoretic are Baynes, “Discourse Ethics and the Political Conception of Human Rights,” 3; Benhabib, *Dignity in Adversity*, 62; Flynn, “Two Models of Human Rights,” 247, n.1.

³⁶⁷ Forst, “The Justification of Human Rights,” 719.

³⁶⁸ Forst, *The Right to Justification*; Rainer Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism* (University of California Press, 2002).

³⁶⁹ Forst, *The Right to Justification*, 19–20, emphasis original.

thereby unilaterally determining what counts as a good reason; the latter means that no affected person's objections may be excluded to achieve general agreeability.³⁷⁰ The moral basis for human rights, as Forst reconstructs it, is "the respect for the human person as an autonomous agent who possesses a right to justification, that is, a right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon him or her."³⁷¹ This means that one claim, namely, human beings' claim to be respected as autonomous agents who have a right not to be subjected to actions and institutional norms that cannot be adequately justified to them, underlies all human rights.³⁷²

When it comes to the grounding of human rights, the starting point must be a claim to be respected as a normative agent who can give and who deserves justifying reasons. This notion of respecting other's autonomy, Forst argues, is neither attached to a contestable notion of the good nor does it require "a translation of a prudential *ethical* value for me to a *moral* reason for all."³⁷³ Forst argues that the right to justification and the criteria of reciprocity and generality serve as the basis for the moral construction of a conception of human rights. Human rights are seen as the result of intersubjective, discursive construction of rights claims that cannot be reciprocally and generally denied between persons who respect one another's right to justification. Forst claims that this kind of respect is owed in a deontological sense which is necessary to carry the weight³⁷⁴ of what we mean by human rights. Respecting other people's autonomy and human rights cannot depend, in a deontological understanding, on a belief that doing so contributes to the good life of the person who shows respect or contributes to the good life of others. Respect rests on other grounds: on recognition of oneself and others as having the capacity of practical reason, of being reasons-giving and reasons-deserving agents. According to Forst's view the ground of human rights is this moral recognition of the other as having a right to justification and that kind of recognition is an imperative of moral practical reason.

³⁷⁰ Ibid., 66. In chapters 1 and 2 of *The Right to Justification*, Forst discusses the moral foundations of this view.

³⁷¹ Forst, "The Justification of Human Rights," 719.

³⁷² This does not mean other rights are directly "derived" from the right to justification but rather that the right to justification serves as the internal (moral) core of every concrete justification.

³⁷³ Ibid., 724. This goes back to the distinction between morality and ethics developed by Habermas and Dworkin: ethical values and conceptions of the *good* answer questions concerning one's good life (what is good for me as an individual or part of a group) whereas *moral* norms answer question concerning how one person's action towards others is generally justifiable (what is right or just for all human beings). This distinction between morality and ethics allows for human rights, understood as universally binding moral norms, to require a moral instead of an ethical, justification. Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification"; Dworkin, "Foundations of Liberal Equality"; Forst, *The Right to Justification*, chap. 3.

³⁷⁴ I believe that by 'weight' Forst means 'moral significance'.

Forst's account of human rights avoids some of the problems associated with the naturalistic and political conceptions discussed in chapters 2 and 3.

First, Forst offers a moral justification of human rights. In contrast to the political conception of human rights which leaves the question of the moral grounding of human rights open and unaddressed Forst offers a moral constructivist justification of human rights on the right to justification.

Second, Forst proposes a moral (not an ethical) justification of human rights. Similar to Griffin's account, a notion of normative agency lies at the center of the idea of human rights in Forst's account. However Forst's notion of normative agency differs from Griffin's in the sense that it is a deontological notion rather than a teleological one. In other words, a notion of personal agency is morally important for human rights not because of its contribution to the good life but independently of that. The normative notion of agency or personhood that lies at the center of the idea of human rights, Forst argues, "is one of an agent as a reason-giving and reason-deserving being—that is, a being who not only has the ability to offer and receive reasons but has a basic right to justification."³⁷⁵

Third, and most important for my purposes here, unlike the political conception, Forst's account and discourse-theoretic accounts in general can account for the political significance of human rights without ignoring their moral importance as well as their role as standards of internal political legitimacy. As discussed in chapter 3, Rawls's refraining from a moral or ethical justification of human rights was deliberate in order not to be susceptible to the ethnocentrism charge. Given the fact of reasonable pluralism, grounding human rights on a religious and comprehensive worldview would not be acceptable to people holding different comprehensive worldviews. However, in order to avoid the ethnocentrism charge, the political conception has left the justification of human rights open and reduced human rights to a minimal list. As such human rights have been reduced to a foreign policy tool for liberal societies. Forst argues that focusing on the role of human rights as setting limits to sovereignty and standards for legitimate intervention is misleading as it misses the intranational purpose of human rights, namely their role in setting standards of internal political legitimacy.³⁷⁶ Rather, he argues, the primary perspective of human rights is from the

³⁷⁵ Forst, "The Justification of Human Rights," 722.

³⁷⁶ I have examined this line of objection to the political conception in section 3.6. Benhabib also proposes a similar line of objection (indeed using almost the same words with Forst): "This 'functional account' [referring to Cohen and Beitz] of human rights considers human rights in terms of their position within international relations and international law and tries to blunt the justification of ever-increasing interventionism. But this is to put the cart before the horse: an adequate conception of human rights cannot be arrived at by asking which minimal list of human rights would prevent interventionism", Benhabib, *Dignity in Adversity*, 236, n.29.

inside; human rights provide reasons for arranging a social and political structure in the right way; they do not provide concrete specifications for the arrangements of a society. Even the views labelled as political tend to neglect that the primary perspective of human rights is from the inside, about the conditions and grounding of the internal legitimacy of a social and political structure rather than the perspective of an outsider who observes a political structure and asks whether there are grounds for intervention (as Beitz and Raz argue).

Therefore, similar to Benhabib's account, Forst's account of human rights also straddles the divide between the naturalistic and political conceptions of human rights. My broader aim in this dissertation is to propose a conception of human rights that is not susceptible to the objections raised against the naturalistic and political conception of human rights. Discourse-theoretic approaches are one possible candidate for such a conception. Thereby, the account of human rights that I propose in chapter 6 relies on the discourse-theoretic accounts, specifically their *intersubjective* justification of human rights based on the right to justification. However, I will offer an interpretation of the right to justification such that this right takes the form of the right to resistance in concrete instances when the right to justification is not respected (see section 6.3). This interpretation of the right to justification, as I shall demonstrate, immunizes the discourse-theoretic accounts from some objections that I will examine in section 4.6; especially the objections by postmodern critics that they are consensus-centric. Before looking at the objections to the discourse-theoretic accounts, let me briefly reflect on the implications of the discourse-theoretic conception for the right to work and the right to housing.

4.5 Is there a human right to work, a human right to housing?

Defenders of both discourse-theoretic and political conceptions of human rights reject the identification of human rights with natural rights. They both reject grounding the idea of a human right on metaphysically controversial assumptions about human nature. Discourse-theoretic approaches to human rights are, however, peculiar in connecting the legitimacy of human rights to democratic deliberation and consensus.³⁷⁷ The basic insight of the discourse theory of rights is that principles and norms (including principles of rights and duties) can claim validity only if they are the outcome of a rational discourse in which all possibly

Habermas also approvingly quotes Forst calling it "a forceful critique of the minimalist approach." See Habermas, "The Concept of Human Dignity," 478, n.27. Hence, one can say the objection to the political conception's narrowing down the focus of human rights to questions of *international* human rights policies is a common objection for Habermas, Benhabib and Forst.

³⁷⁷ See, for example, Benhabib, *The Rights of Others*; Forst, "The Justification of Human Rights"; Erman, *Human Rights And Democracy*.

affected persons participate equally. In this sense, democratic participation is not perceived as a separate right, but rather as an (institutionalized) procedure in the construction of rights in the first place. So far, I have been focusing on the *justification* of human rights within discourse-theoretic accounts. What about their scope: what do discourse-theoretic accounts imply for the content of human rights?

As discussed in section 4.2.1, Habermas offered a reconstruction of the system of rights with five categories of basic rights. To recapitulate, these categories, in brief, are: 1) rights to equal individual liberties, 2) rights to political membership and association, 3) rights securing equal protection under law, 4) rights to equal political participation and 5) social and economic rights in so far as they are necessary to exercise the rights in the first four categories. However, this is the reconstruction of the system of rights within constitutional democracies, not international human rights.³⁷⁸ Moreover, these are categories of rights; their concrete content needs to be worked out discursively by participants in various contexts.³⁷⁹ Similarly, Forst and Benhabib are silent on the content of human rights. In other words, they do not offer a complete list of human rights. Because of this silence about the content of human rights, discourse-theoretic accounts can be accused of being ‘empty’ formal accounts. In this sense, discourse-theoretic accounts are faced with a dilemma. On the one hand, they refrain from imposing the moral theorist’s view on the content of human rights. They refrain from deriving a fixed and complete list of human rights from the best moral theory *a priori* like the naturalistic conceptions do (e.g. in Griffin’s account, normative agency is the foundation of human rights and from that foundation a substantial list of human rights is derived). Instead, they argue that the form that human rights take must be determined discursively.³⁸⁰ On the other hand, they do not want to compromise with the *status quo* or existing power relations and accept the determination of the content of human rights according to the contingent standards of international law as the political conceptions do. Recall Forst’s objection to the political conceptions, that by focusing on the political-legal

³⁷⁸ Yet, one can argue that Habermas, unlike Rawls, does not have a strict separation between thinking about human rights in term of constitutional democracies versus the global context. See, for example, Flynn, “Two Models of Human Rights,” 252.

³⁷⁹ Habermas adds the phrase “whatever their concrete content” in parenthesis after the term “basic rights” in the depiction of the first four categories in his article where he examines how the system of rights is constructed in constitutional democracies, see Jürgen Habermas and William Rehg, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?,” *Political Theory* 29, no. 6 (2001): 777.

³⁸⁰ Forst, “The Basic Right to Justification,” 49. This concern stems from Habermas’s rejection of the Kantian idea of “morally laden individual rights, which claim normative independence from, and a higher legitimacy than, the political process of legislation” Habermas, *Between Facts and Norms*, 89. However, Habermas also acknowledges elsewhere this is ‘not so obvious for classical human rights that guarantee the citizen’s private autonomy’; they can have intrinsic value which is not reducible to their instrumental value for democratic will-formation, Habermas, “Remarks on Legitimation through Human Rights,” 117.

role of human rights within international law, they miss the intranational aspect of human rights (see section 3.6).

As an alternative to naturalistic and political conceptions in the determination of the content of human rights, discourse-theoretic accounts pose ‘a dual nature of human rights’: they are moral rights that require institutionalization. Habermas argues that human rights exhibit a Janus-face turned simultaneously to law and morality.³⁸¹ Similarly, Forst argues that there is an integrated two-tiered aspect of political and moral constructivism:

In their concrete *form* and their positive-legal sense, human rights are of a juridical nature, but their *core content* is of a moral nature. Where they arise, demands for human rights are moral demands, and they are primarily justified with moral reasons. Their core content is not—and here the integrated two-tiered aspect of moral and political constructivism is significant—prior to political justice in the sense of natural rights; rather, it is always concretely legitimated and recognized in specific discourses of justification.³⁸²

What about specific human rights claims? Is there a right to work, a right to housing according to discourse-theoretic accounts? According to Habermas’s system of rights, “the category of social and ecological rights (the fifth category) can be justified only in relative terms” whereas four categories of civil rights are justified absolutely (items 1-4).³⁸³ David Ingram argues that this could mean either of two things: the first four categories of rights are prior only in the logical order of justification and the fifth category is deduced from the other categories, or the fifth category is less binding and imperative (less prior in the logical order of institutionalization).³⁸⁴ Now, in the logical order of justification, it is reasonable to give the fifth category a derivative and relative status as it would be hard to argue that such a category is an implicit conceptual presupposition of the practice of constitution making. But when we shift to realization and institutionalization (the second-stage of the genesis of rights), every valid human right, including social rights, has to have a moral justification for all of them to be *equally* valid.³⁸⁵ However, Habermas has not been clear on this point when he states that social and economic rights can be justified only in relative terms.

Therefore, Habermas provides no clear answer as to how ‘political and civil rights’ and ‘classical human rights’ need to be ranked with respect to economic, social and cultural rights. Like Rawls, he seems to privilege civil and political rights above social, economic and cultural rights on some occasions. At other times, he argues that the negative freedom to

³⁸¹ Habermas, “The Concept of Human Dignity,” 470.

³⁸² Forst, *The Right to Justification*, 221, emphasis original.

³⁸³ Habermas, “Remarks on Legitimation through Human Rights,” 123.

³⁸⁴ David Ingram, “Between Political Liberalism and Postnational Cosmopolitanism: Toward an Alternative Theory of Human Rights,” *Political Theory* 31, no. 3 (2003): 373.

³⁸⁵ Jeffrey Flynn, *Reframing the Intercultural Dialogue on Human Rights: A Philosophical Approach* (Routledge, 2013), 179.

“pursue one’s private conception of the good” without interference is meaningless apart from the positive freedom to be protected and supported in this endeavor.³⁸⁶ This ambiguity of Habermas’s position with respect to the status of socio-economic rights has been criticized for not accounting for the complementarity of human rights or giving too many concessions to realism.³⁸⁷

Forst’s account, on the other hand, has a more secure justification of social and economic rights. His right to justification forms both procedural and substantive foundations for “the justification, determination, and recognition of *all* rights that citizens cannot reasonably deny one another, whether they be liberal rights to security of person, political rights to participation, or social and economic rights.”³⁸⁸ All human rights including social and economic rights have their moral justification on the basis of the right to justification. In political and social contexts the rights claims can take various forms but to the degree that they are demanded based on the moral arguments resulting from the right to justification, that fundamental moral right substantiates all human rights. In chapter 6, I develop an account of human rights which grounds human rights on the right to justification interpreted as a right to resistance and I will argue that this grounding of human rights unlike Rawlsian and Habermasian systems of rights does not privilege civil and political rights over social and economic rights.

4.6 Objections to discourse-theoretic approaches

Objections to discourse-theoretic approaches can come from various philosophical traditions. In the following, I will discuss the most common lines of objection to discourse-theoretic accounts which are also pertinent for a discourse-theoretic understanding of human rights.

4.6.1 The circularity objection

One well-known objection is the *circularity* objection. The circularity charge is frequently leveled at Habermas’s rules of discourse, derivation of the principle of U and the overall

³⁸⁶ Habermas, *Between Facts and Norms*, 41–42.

³⁸⁷ For the former objection see Ingram, “Between Political Liberalism and Postnational Cosmopolitanism.” and for the latter objection see Flynn, *Reframing the Intercultural Dialogue on Human Rights*. Ayşen Candaş Bilgen draws attention to the fact that for Habermas social rights can be *paternalistically* imposed by a sovereign authority (i.e. in the form of a welfare state) and argues that this feature of social rights might be the reason why Habermas ascribes a secondary status to social rights compared to political rights which are self-referential and cannot be imposed top-down, Ayşen Candaş Bilgen, “Habermas ve Sosyal Hakların Eleştirisi Meşruiyeti (Habermas and the Legitimacy of Social Rights),” *Toplum ve Bilim* no. 110 (2007): 77, 80.

³⁸⁸ Forst, *The Right to Justification*, 112, emphasis original.

argument of discourse ethics.³⁸⁹ The circularity objection arises because the programme of discourse ethics is originally conceived as a *philosophical* justification of the moral principle or the moral standpoint.³⁹⁰ As Habermas sets out his original programme in his *Moral Consciousness and Communicative Action* in 1983, the formal derivation of principle (U) from non-moral premises is central to this programme. If the principle (U) can be derived from non-moral premises, then (U) can be justified on the non-moral grounds of Habermas's theory of communicative action and the pragmatic theory of meaning.³⁹¹ However, the rules of discourse smuggle in moral assumptions and raise the threat of circularity.

Perhaps, it is important to briefly mention Habermas's notions of discourse and rules of discourse to understand the circularity objection. Discourse is exchange of reasons for validity claims of different sorts whereas certain rules of discourse are what Habermas calls "idealizing pragmatic presuppositions of discourse."³⁹² Habermas identifies three levels of rules. On the first level, there are the basic logical and semantic rules, such as the principle of non-contradiction and the requirement of consistency. On the second level, there are norms governing procedure, such as the principle of sincerity, namely that every speaker may assert only what she genuinely believes; and the principle of accountability, that every speaker may either justify upon request what they assert or provide reasons for not offering a justification.³⁹³ On the third level, there are the norms that immunize the process of discourse against coercion, repression, and inequality. These include the rules that:

- 1) Every subject with the competence to speak and act is allowed to take part in the discourse.
- 2) a) Everyone is allowed to question any assertion whatsoever.
b) Everyone is allowed to introduce any assertion whatsoever into the discourse.
c) Everyone is allowed to express his attitudes, desires, and needs.
- 3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (1) and (2) above.³⁹⁴

Habermas calls the rules of discourse 'pragmatic presuppositions', because they are

³⁸⁹ The circularity objection is also leveled at Habermas's consensus theory of truth or his intersubjective understanding of the constitution of the self, etc. which I will not examine here.

³⁹⁰ Cf. Habermas, *Moral Consciousness and Communicative Action*, 43, 78–86.

³⁹¹ Finlayson, "Modernity and Morality in Habermas's Discourse Ethics," 320.

³⁹² Habermas previously named these rules of discourse as defining characteristics of an "ideal speech situation." Habermas, *Reflections on the linguistic foundations of sociology: The Christian Gauss Lectures* (Princeton University, February–March 1971/2001). In Jürgen Habermas, *On the Pragmatics of Social Interaction: Preliminary Studies in the Theory of Communicative Action*, trans. Barbara Fultner (Cambridge, MA: MIT Press, 2001), 97 ff. Later Habermas rephrases the rules of discourse as "the universal and necessary communicative presuppositions of argumentative speech", Habermas, *Moral Consciousness and Communicative Action*, 86.

³⁹³ Habermas, *Moral Consciousness and Communicative Action*, 87–88.

³⁹⁴ *Ibid.*, 89.

implicit presuppositions of the *practice* of discourse. These pragmatic presuppositions of discourse are necessary, because no one who participates in a discourse—in the give and take of reasons—can avoid making them. These presuppositions are also *counterfactual* in the sense that real discourses cannot empirically assure full-inclusion, non-coercion, etc. Moreover, the rules of discourse are *idealizing* such that they direct participants inwards the ideal of rationally motivated consensus. A discourse, in which the voices of all concerned are included, in which no argument is arbitrarily excluded from consideration and in which only the force of the better argument prevails, will result in a consensus on the basis of reasons acceptable to all. In real life, where time is limited and participants are prone to error and coercion, discourses will only ever approximate these ideals to a greater or lesser degree.³⁹⁵ Yet these ideals are *regulative*—they serve as “a critical standard against which every actually realized consensus can be called into question and tested.”³⁹⁶

The circularity objection entails that rules of discourse (especially rule 2. c) and 3)) have *prima facie* moral significance and cannot count as a non-moral premise in an argument for (U).³⁹⁷ The implication of this circularity objection for discourse-theoretic accounts of human rights is that formal conditions of discourses (e.g. equality, symmetry and reciprocity in Benhabib’s account, and reciprocity and generality in Forst’s account) already *presupposes* a moral standpoint and corresponding understanding of ‘good reasons’. As a consequence, only those moral viewpoints that are compatible with the recognition of communicative freedom and their reasons enter into discourses. So, the objection goes, discourse-theoretic justifications are mired in circularity.

Benhabib acknowledges that there is circularity in this reasoning but she claims that it is not a ‘vicious circle’.³⁹⁸ Rather the circularity in discourse ethics is the *hermeneutic* circularity of practical reason. Practical reason is different from theoretical reason in the sense that it cannot start from uncontested first principles.³⁹⁹ Benhabib argues an essential feature of

³⁹⁵ Gordon James Finlayson, *Habermas: A Very Short Introduction* (Oxford: Oxford University Press, 2005), 43–44.

³⁹⁶ Jürgen Habermas, “Wahrheitstheorien”, in *Wirklichkeit und Reflexion: Festschrift für Walter Schulz* (Pfullingen, 1973), 258 is quoted in “Translator’s Introduction” in Jürgen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1975), xviii.

³⁹⁷ Finlayson, *Habermas: A Very Short Introduction*, 89–90.

³⁹⁸ Benhabib does not explain what she means by a vicious circle. To my mind, Benhabib’s idea of the vicious circle needs to be understood as an argument whereby the conclusion is already presumed in the premises.

³⁹⁹ It can also be claimed that even the first principles of theoretical reason are contested or that facts and values are intertwined even in theoretical reasoning. In this case, the difference between theoretical and practical reason can be considered to be a matter of degree rather than kind. However, without going into a discussion of how theoretical and practical reason differs, I confine myself to the claim that all practical reasoning unavoidably starts from some normative presuppositions although these are open to reflexive justification or recursive validation.

reasoning in morals and politics is that we always assume some understanding of equality, reciprocity and symmetry in order to frame the justificatory enterprise. Hence it is unavoidable to have some normative presuppositions if we are engaging in the enterprise of justification at all.⁴⁰⁰ According to Benhabib any justification of human rights, will presuppose some conception of human agency, of human needs, of human reason, as well as making some assumptions about the characteristics of our social-political world. While Gewirth and Griffin build their justification of human rights on a conception of human agency, Rawls's project of developing 'public reason' presupposes that the late-modern world is characterized by inevitable pluralisms and the burdens of judgment as well as by the presence of distinct (liberal, decent hierarchical, outlaw) societies.⁴⁰¹ Therefore, what distinguishes discourse-theoretic justifications of human rights from other justificatory strategies is not that they make normative presuppositions but that they presuppose 'communicative reason' in the justification.

Another possible response to the circularity objection is to drop the ambition of justifying moral premises on the basis of non-moral premises. Forst takes this route. According to Forst, one of the central insights of Kantian moral philosophy is that a categorically valid morality requires an *unconditional* ground.⁴⁰² Morality requires an *autonomous* justification which is based not on prudential or empirical reasons but on moral reasons only. The implication of this for human rights, according to Forst, is that a moral justification of human rights should be based on moral reasons only. Grounding morality (exclusively) on moral reasons, does mean, though, that the discourse theory of morality won't be in a position to convince the moral sceptic, but that may be too much to ask for any moral theory.⁴⁰³ Forst is very clear on this issue. For him, moral justification is not a matter of providing a "moral skeptic" with a reason to be moral.⁴⁰⁴ Even if the question of how to convince a moral skeptic does not arise,

⁴⁰⁰ In *The Claims of Culture*, Benhabib addresses the questions of the limitations of what discourse-theoretic models count as good reasons. She makes a distinction between the "syntax" and "semantics" of public-reason giving. Reasons, she suggests, would be counted as good reasons because they could be considered as being in the "best interest of all considered as moral and political beings." And to parse X or Y (a policy, a law, a principle of action, to be) in the best interests of all, "would mean that we have established X or Y through processes of public deliberation in which all affected by these norms and policies take part as participants in a discourse." Benhabib claims that there is no way to know in advance which semantically specific claims or perspectives may count as "good reasons." What discourse ethics, as well as deliberative democracy modeled on discourse ethics, rule out are some kinds of reasons - these are ones that cannot be syntactically generalizable, Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002), 140 ff.

⁴⁰¹ Benhabib, *Dignity in Adversity*, 65.

⁴⁰² Forst, *The Right to Justification*, 77.

⁴⁰³ Finlayson, *Habermas: A Very Short Introduction*, 90.

⁴⁰⁴ Rephrasing a famous remark by Heidegger, Forst says: "One could say that it is not so much a scandal of philosophy that no answer has yet been found to the question concerning nonmoral interests in being moral that

there are still other objections to Forst's moral justification based on the right to justification such as how to reconcile the Kantian transcendentalism of "unconditional moral law" and Habermasian constructivist theory.⁴⁰⁵

4.6.2 The critique of rational consensus

Another common objection is the criticism of the idea of rational consensus that underpins discourse theory. One such criticism is prominently put forward by Chantal Mouffe, especially with respect to discourse-theoretic models of democracy.⁴⁰⁶ Mouffe argues that discourse-theoretic accounts share with liberal democratic theory its "individualistic, universalistic and rationalist framework."⁴⁰⁷ She claims that Habermas, like Rawls, denies that there is a paradoxical nature of modern democracies and a fundamental tension between the logic of democracy and liberalism. They both try to reconcile what is irreconcilable and they both mistakenly search for "a final rational resolution."⁴⁰⁸ According to Mouffe, by perceiving the central issue of politics as one of reason and rational argumentation, deliberative democratic theories have a *moral* model of the dimension of the political and as such they cannot envisage the nature of a pluralistic democratic public sphere in an adequate manner.

In order to assess how destructive such criticisms of the notion of rational consensus can be for discourse theory and to see if discourse-theoretic accounts of human rights have theoretical resources to answer such objections, I divide the objection of the idea of rational

could convince the skeptic; rather, the scandal lies in the fact that an answer to this question is still being sought. For from the perspective of someone who understands himself as a moral being, from the perspective of moral 'being-in-the-world,' so to speak, this question does not even arise; and someone who does not understand himself morally can never be brought to see the point of morality in this way [by arguing being moral pays off or is rooted in self-regarding empirical interests of the person]. This is what is meant by the autonomy of morality", Forst, *The Right to Justification*, 58.

⁴⁰⁵ According to Fernando S. Müller, Forst's position is characterized by a fundamental ambiguity as it oscillates between two irreconcilable points, namely between transcendentalism and constructivism, Fernando S. Müller, "Justifying the Right to Justification An Analysis of Rainer Forst's Constructivist Theory of Justice," *Philosophy & Social Criticism* 39, no. 10 (2013): 1049–68. Forst will most probably not accept this objection. In Forst's view a moral theory of justice and human rights can be both agnostic and autonomous. It can be agnostic about the good life and it can be autonomous in the sense of providing only moral reasons for the justification of validity claims. His theory of human rights based on the right to justification is agnostic about what constitutes a good life. In chapter 1 of his *Right to Justification*, Forst argues for a constructivist understanding of the sharability of reasons that remains agnostic vis-a-vis the (ultimately metaphysical) question of realism. He asserts: "the constructivism sketched thus far can take an agnostic stance on the controversy over whether reciprocally and generally justified norms, or the reasons for them, are "made" by us or are merely "cognized" and then "recognized?" It is a *practical, not a metaphysical*, constructivism, Forst, *The Right to Justification*, 50, emphasis original.

⁴⁰⁶ Chantal Mouffe, "Deliberative Democracy or Agonistic Pluralism?," *Social Research* 66, no. 3 (1999): 745–58; Chantal Mouffe, *The Democratic Paradox* (London and New York: Verso, 2000).

⁴⁰⁷ Mouffe, "Deliberative Democracy or Agonistic Pluralism?," 745.

⁴⁰⁸ Mouffe, *The Democratic Paradox*, 93.

consensus into two parts: namely a) *the critique of consensus* and b) *the critique of reason*.

a) *The critique of consensus*: When Mouffe criticizes Habermasian forms of deliberative democracy, part of her objection is directed to this view's aiming to solve political problems through a procedure of rational argumentation which aims to arrive at consensus. She challenges the very idea of a neutral or rational dialogue and claims that "far from being merely empirical, or epistemological, the obstacles to the ideal speech situation are ontological."⁴⁰⁹ She uses Wittgenstein's insights to challenge Habermas's conception of procedure and his emphasis on arriving at consensus (rather than persuasion, for example) as a result of reasoned argumentation.⁴¹⁰ She argues that pluralism is not merely a matter of fact as Rawls envisages but an axiological principle.⁴¹¹ Nor are conflicts empirical impediments that prevent the realization of consensus as Habermas envisages. Instead, she argues that conflicts are constitutive of all communication and deliberation and as such they are central to politics. Deliberative democracy should acknowledge the dimension of power and antagonism, which are ineradicable. Otherwise the utopia of a neutral and rational consensus not only remains unrealistic but it also becomes a dangerous utopia because the pursuit of consensus in practice masks and serves power.

Mouffe's alternative proposal is an agonistic model of democracy or what she calls "agonistic pluralism."⁴¹² The main question of democratic politics for her is not the elimination of power but to constitute forms of power that are compatible with democratic values. For the basis of this alternative view, Mouffe makes a distinction between "the political" and "politics":

By "the political," I refer to the dimension of antagonism that is inherent in all human society, antagonism that can take many different forms and can emerge in diverse social relations. "Politics," on the other hand, refers to the ensemble of practices, discourses and institutions that seek to establish a certain order and to organize human coexistence in conditions that are always potentially conflictual because they are affected by the dimension of "the political." . . . [The fundamental question for democratic politics], *pace* the rationalists, is not how to arrive at a rational consensus reached without exclusion, that is, indeed, an impossibility. Politics aims at the creation of unity in the context of conflict and diversity; it is always concerned with the creation of an "us" by the determination of a

⁴⁰⁹ Mouffe, "Deliberative Democracy or Agonistic Pluralism?," 751.

⁴¹⁰ Although I do not go into the details of Mouffe's argument about the ontological obstacles to a neutral or rational dialogue, the basic idea is that according to Wittgenstein agreement in language implies agreement in forms of life but not in agreement in reasons. Using this insight from Wittgenstein, Mouffe argues that Habermasian discourse perspective needs to reintroduce the rhetorical dimension that Habermas left out from the process of deliberation. Cf. *Ibid.*, 749–750.

⁴¹¹ I guess what Mouffe means by 'axiological principle' is that the pluralism of values is ineradicable and constitutive of different subjectivities.

⁴¹² *Ibid.*, 754–757. Mouffe and Laclau put forward the theoretical basis of an approach of radical democracy or an agonistic model of democracy in their Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001).

“them”⁴¹³.

In Mouffe’s formulation the political (the dimension of antagonism) is a relation between enemies whereas politics (the dimension of agonism) is a relation between adversaries. An adversary, Mouffe says, is a legitimate enemy, “an enemy with whom we have in common a shared adhesion to the ethico-political principles of democracy.”⁴¹⁴ It is this part of Mouffe’s argument—the *alleged transformation from antagonism to agonism via some ethico-political principles*—that is frequently criticized by proponents of deliberative democracy.⁴¹⁵ They claim that contrary to what Mouffe claims, her agonistic pluralism *presupposes* a notion of consensus. Mouffe acknowledges that pluralist democracy demands a certain amount of consensus but she claims that it concerns only some ethico-political principles and those ethico-political principles can only exist through many different and conflicting interpretations so that the consensus about them is bound to be a “conflictual consensus.”⁴¹⁶ The question is then how enemies turn to adversaries if they do not agree on some values of democracy and what (moral) status these ethico-political principles have.

Apart from exposing the presupposition of consensus underlying Mouffe’s notion of agonistic democracy, another way of responding to such objections that discourse theory relies on consensus is the argument that it is possible to incorporate conflict and dissent in discourse theory. Benhabib, for instance, claims that the motivation for moral discourses indeed arises when “the certitudes of our life-worlds break down through conflict, dissent, and disagreement.”⁴¹⁷ Discourses are indeed initiated when there is a *disagreement* on the validity of a statement. In other words, there is always room for dissent; for saying ‘no’ within the discourse. Benhabib also notes that discourses are not simply “hypothetical thought experiments or conversation chambers we choose to enter into or exit at will, they are reflexive dialogues the need for which emerges out of the very real problems of our life-worlds.”⁴¹⁸

Forst also claims his account allows for dissent rather than pure consensus as the basis of morality especially in virtue of the fact that his right to justification includes a veto right:

⁴¹³ Mouffe, “Deliberative Democracy or Agonistic Pluralism?,” 754–755.

⁴¹⁴ *Ibid.*, 755.

⁴¹⁵ For instance, Andrew Knops has convincingly shown that Mouffe’s notion of agonism is dependent on deliberative presuppositions, Andrew Knops, “Debate: Agonism as Deliberation—On Mouffe’s Theory of Democracy,” *Journal of Political Philosophy* 15, no. 1 (2007): 115–26. Eva Erman takes this argument further to claim that deliberative presuppositions are presumed by Mouffe’s notion of antagonism as well, Eva Erman, “What Is Wrong with Agonistic Pluralism? Reflections on Conflict in Democratic Theory,” *Philosophy & Social Criticism* 35, no. 9 (2009): 1039–62.

⁴¹⁶ Mouffe, “Deliberative Democracy or Agonistic Pluralism?,” 756.

⁴¹⁷ Benhabib, *Dignity in Adversity*, 72.

⁴¹⁸ *Ibid.*

These two criteria [criteria of reciprocity and generality] taken together confer upon moral persons a basic, if qualified, *veto right*: the basic right to justification. This veto right is “qualified” in the sense that the moral appeal as “veto” itself must observe the criteria of reciprocity and generality. Consequently, on the basis of this fundamental right, human rights are established as rights that no one can reasonably—that is, with reciprocal and general arguments—reject and deny others. The advantage of this negative formulation lies in the fact that it makes use of a qualified, instead of a simple, criterion of consensus that allows us to assess the justifiability of different positions in cases of dissent.⁴¹⁹

Therefore it may be argued that discourse-theoretical accounts of human rights like Benhabib’s and Forst’s have the potential to incorporate elements of dissent and conflict in society. In this way, it is possible to move beyond the interpretations of Habermasian discourse theory as one based on a positive notion of consensus.⁴²⁰ However, Forst’s formulation of the veto right remains underspecified: he does not demonstrate how the cases of dissent can be accounted for within the framework of the right to justification. In chapter 6, I will offer an interpretation of Forst’s right to justification as ‘a right to resistance’ and I will argue that real-life struggles can be understood as instantiations of the right to justification in the form of resistance to bad justifications. This interpretation, I will argue, makes the implicit potential of discourse-theoretic accounts of human rights to incorporate dissent and conflict into the foundations of human rights explicit by exposing how the contestations and conflicts over right-claims can be interpreted as demanding justification and resisting bad justifications of the policies, institutions, and laws one is subjected to. In this way, the cases of dissent and conflict over rights can be accounted for by the right to resistance and consequently dealt with more precisely. Although discourse theory makes room for disagreement and conflict to enter into discourses, they are nevertheless forms of ‘reasonable disagreement’. This brings us to the second part of the critique, namely the critique of reason.

b) *The critique of reason*: Apart from pointing to the tension between consensus and conflict, Mouffe’s objection to Habermasian theory of deliberative democracy relies on the critique of the emphasis on rational deliberation in Habermas’s discourse theory of morality:

One of those approaches, the aggregative model, sees political actors as being moved by the pursuit of their interests; the other, the deliberative model, stresses the role of reason and moral considerations. Both of these models leave aside the central role of ‘passions’ in the creation of collective political identities. In my view one cannot understand democratic

⁴¹⁹ Forst, *The Right to Justification*, 214, emphasis original.

⁴²⁰ Øjvind Larsen, for instance, claims that it is a recurring feature of most presentations of Habermas’s communicative ethics and social theory that they present communicative ethics as “a positive consensus theory.” He, on the other hand, aims to give an interpretation of Habermas’s communicative ethics as “a negative critical ethics” in which “a negation or a *Nein-sagen-Können*” forms the basis for the discussion of the validity of norms. Øjvind Larsen, *Right to Dissent: The Critical Principle in Discourse Ethics and Deliberative Democracy* (Museum Tusculanum Press, 2009), 310–311, n.103–104.

politics without acknowledging passions as the moving force in the field of politics.⁴²¹

Mouffe argues that not only rational arguments and reasonable claims but also emotions, passions and different identity positions should be included in the public political sphere. She claims that “[b]y privileging rationality . . . [we] leave aside a central element, which is the crucial role played by passions and affects in securing allegiance to democratic values.”⁴²²

Although Mouffe directs her critique of reason mainly to Rawls’s theory of political liberalism and Habermas’s theory of deliberative democracy, similar objections are also raised against Forst’s account of morality by other scholars. For example, Andrea Sangiovanni argues that not only rational deliberation and action but also social emotions and particularly the emotion of empathy grounds morality.⁴²³ In reply, Forst argues that in his account he does not claim that in order to be a rational agent or person at all one needs to follow the precepts of morality. His position is more modest, he suggests: to be fully reasonable in a practical sense, one must be willing and able to give reasons for one’s morally relevant actions.⁴²⁴ He agrees with Sangiovanni that a certain form of empathy belongs to being a responsible moral agent. However he does not think that emotions in general and empathy in particular have any grounding role. “The kind of empathy required for morality”, Forst claims, “is a form of *reasonable* empathy, guided by principles such as treating like cases alike, treating all persons equally and so on.”⁴²⁵ This can be interpreted that passions can be used in explaining one’s behavior but they do not do any justificatory work. Extending Forst’s reasoning in his response to Sangiovanni to his account of human rights grounded on the right to justification, one can argue that not only reasoned argumentation and deliberation but also passions enter into actions which can be considered within the realm of the politics of human rights. Rage and anger against injustices and wrongs can motivate political actions of

⁴²¹ Chantal Mouffe, *Politics and Passions: The Stakes of Democracy*, Centre for the Study of Democracy (London: Centre for the Study of Democracy, 2002), 6.

⁴²² Mouffe, *The Democratic Paradox*, 95. This quote can be interpreted in a way that for Mouffe not reasonable agreement but these collective passions which secure allegiance to democratic values make the transition from antagonism to agonism possible. However, I do not further explore this interpretation as it is beyond the scope of this dissertation.

⁴²³ Andrea Sangiovanni, “Scottish Constructivism and The Right to Justification,” in *Justice, Democracy and Justification: Rainer Forst in Dialogue*, ed. David Owen (Bloomsbury, 2014), 47ff. Bert van den Brink raises another objection arguing that Forst remains silent about the sociological development of the capacity to act morally. Forst’s account of the practical ground of morality is not enough to stress the importance of the capacity for moral insight. The capacity to act from this practical ground of morality, Brink claims, needs to be brought out in practice through education and upbringing and therefore contingent on the life-worlds and language-games in which one grows up—a line of thought on which Forst remains largely silent in his discussion of the foundations of morality, Bert H.H.A. van den Brink, “The Right to Justification,” *Krisis: Journal for Contemporary Philosophy* no. 3 (2008): 60.

⁴²⁴ Rainer Forst, “Justifying Justification: Reply to My Critics,” in *Justice, Democracy and Justification: Rainer Forst in Dialogue*, ed. David Owen (London and New York: Bloomsbury, 2014), 174–175.

⁴²⁵ *Ibid.*, 176, emphasis original.

standing up to those wrongs. Nevertheless, passions would not do any justificatory work in the construction of the moral right to justification.

The upshot of the debate is that discourse-theoretic accounts of human rights can be criticized for focusing on the role of consensus and the exchange of reasons in the justification and politics of human rights. In chapter 6, I shall argue that it is possible to develop an account of discursive democracy and human rights that is more contestatory (that is including elements of conflict) than an exclusive emphasis on reasoned debate and consensus. For this, I suggest an interpretation of Forst's notion of the right to justification as a right to resistance. This interpretation will push the discourse-theoretic conception to the agonistic direction thereby not making it susceptible to objections that it is consensus-centric. The critique of reason, on the other hand, remains as an objection to my account too. Yet, in my view this does not need to concern us, since I believe, as I have argued in this section, that this critique can be properly responded to.

4.7 Conclusion

In the last three chapters, I have examined three different theoretical approaches to human rights in the philosophical literature: the naturalistic conception, the political conception and the discourse-theoretic conception of human rights. I have examined various versions of each conception. I also reflected on the implications of each conception for the cases of the right to housing and the right to work. Given the diversity of different views, it appears to be inconceivable that there would be a plausible conception of human rights which is coherent and cogent with a normative grounding as well as justifying a more than minimum set of rights including the rights claims I have focused on as human rights. The next step is an attempt to propose such a conception. Before that, however, there is one more step to take which is to examine the fundamental objections to the idea and human rights discourse in general and socio-economic human rights in particular. If the approach I propose can take into account these objections and answer the relevant ones, it will become more attractive theoretically and more effective practically. In the next chapter, I therefore turn to examination of some fundamental objections to human rights.

5 Critiques of Human Rights

5.1 Introduction

It is repeatedly stated that human rights have become the *lingua franca* of modern politics. The notion of human rights is increasingly used by many groups to articulate their demands and protests. However, this increased prominence of the discourse of human rights has been accompanied by a growing skepticism about the value and political efficacy of rights. Skepticism about human rights takes various forms ranging from the wholesale rejection of morality to the claim that human rights are not a logically coherent idea; from claims that although human rights are an appealing moral idea, in practice they turn out to be ineffective or, even worse, an instrument of domination and oppression, to claims that not individual rights but considerations of social utility, community and solidarity should be prioritized. These forms of skepticism are not necessarily mutually exclusive, instead they can go together.

In chapters 2, 3 and 4, I discussed some objections raised against the naturalistic, political and discourse-theoretic conceptions of human rights respectively. These objections were not targeting the very discourse of rights but rather the specific conceptualizations of human rights as natural rights, political rights or according to the discourse theory of morality. In this sense, one can call those objections to human rights *internal* objections, as they are objections within the framework of a certain conception of human rights. In this chapter I will examine *external* objections to the very discourse and framework of human rights. These objections attack what are perceived to be core assumptions of a theory of human rights, namely that rights principles are abstract, individualist, ethnocentric, bourgeois.⁴²⁶ These I will examine in section 5.2. Given that I am focusing on the right to work and the right to housing, I will, in section 5.3, focus on critiques that are specific to socio-economic rights since they are more under fire than civil and political rights. Finally, I will examine how the

⁴²⁶ These objections can also be structured differently. For instance, one can put the modern critique of human rights into historical perspective as Waldron does in his book, Jeremy Waldron, ed., *“Nonsense Upon Stilts”: Bentham, Burke, and Marx on the Rights of Man* (London and New York: Methuen, 1987). As Waldron acknowledges, misgivings about rights is not a new phenomenon: “[j]ust as the theories of natural rights and the rights of man that developed in the seventeenth and eighteenth centuries are the ancestors of the modern idea of human rights, so the critiques of those theories that appeared in that period are the starting-point of modern misgivings about the direction this idea is taking us in our moral and political thinking”, *Ibid.*, 2. In this chapter, although I mention the historical precursors of some of the modern critiques, my main aim is to explore the common themes (e.g. individualism, abstraction) among different viewpoints (e.g. conservative, liberal and socialist viewpoints) from which contemporary theories of human rights may and has been attacked.

relevant insights from these critiques can be incorporated into our thinking about the notion and politics of human rights (5.4).

5.2 Objections to human rights in general

When the rights of man were formulated at the end of the eighteenth century, first in the United States and then in France, they were criticized by conservatives with the claim that they were disastrous for the existing social order. Aside from conservatives of the day such as Edmund Burke and Joseph de Maistre, the idea of the rights of man was also criticized by radical thinkers of the time, most famously by Karl Marx. These critiques have continued to be influential until today not only among some conservatives and communitarians but also among the political left.

Below, I shall consider some early and contemporary objections to the idea of human rights under four headings: the abstraction objection, the individualism objection, the ethnocentrism objection and the (capitalist) ideology objection. I will also briefly assess how the different conceptions of human rights I have discussed so far, are vulnerable to these objections. These objections are not mutually exclusive; instead they are closely connected and can go together. Neither is this list of objections exhaustive: rather I will limit myself to objections that I deem important that a conception of human rights needs to take into account. In the next chapter, I will offer an account of human rights which, I will argue, withstands these objections.

5.2.1 The abstraction objection

The abstraction objection to human rights has been voiced by various scholars. As Onora O'Neill claimed, despite grave differences of view among them, Burke, Bentham, Hegel and Marx, all criticized certain ethical theories, in particular theories of rights for being too *abstract*.⁴²⁷ Burke, for instance, attacked the *abstract* formulation of the 'rights of man' in his 1790 essay "Reflections on the Revolution in France." He thought that the abstract formulation of rights made them practically ineffective. Burke asks: "What is the use of discussing a man's abstract right to food and medicine? The question is upon the method of procuring and administering them. In that deliberation I shall advise to call in the aid of the farmer and the physician rather than the professor of metaphysics."⁴²⁸ Burke accused

⁴²⁷ Onora O'Neill, "Abstraction, Idealization and Ideology in Ethics," *Royal Institute of Philosophy Lecture Series* 22 (1987): 55, emphasis original.

⁴²⁸ Edmund Burke, *Reflections on the Revolution in France*, ed. Conor Cruise O'Brien (London: Penguin Books, 2003), 200–201.

proponents of the abstract rights of man being metaphysical rationalists or “speculatists” who believe that political practice should be guided by theory.⁴²⁹ He argued that the realm of politics is complex involving contingency and depending on particular historical and spatial circumstances. Political judgments need to take into account these particular and concrete circumstances rather than taking an abstract and universal standpoint. Burke also criticized the abstract formulation of the *subject* of human rights. For Burke, there was no such a thing as an abstract man and his rights but only socially determined people and their rights created by their particular history, tradition and culture.⁴³⁰ Both conservative and radical critiques of Burke’s time agreed with some aspects of Burke’s criticism of the abstract subject of rights of man. One of the most notable adversaries of the French Revolution, Joseph de Maistre in criticizing its declaration and constitution stated that:

The constitution of 1795, like its predecessors, has been drawn up for Man. Now, there is no such thing in the world as Man. In the course of my life, I have seen Frenchmen, Italians, Russians, etc.; I am even aware, thanks to Montesquieu, that one can be a Persian. But, as for Man, I declare that I have never met him in my life.⁴³¹

Hence, the conservatives of the time were criticizing the talk about abstract rights of man and they were putting emphasis on the superiority of national rules and rights.

When Burke was criticizing the abstract formulation of the rights of man and their subjects, he was pointing to the *positive* aspects of rights, i.e. they are products of local conventions and rules rather than derived from abstract ethical principles. Later, Hannah Arendt took up Burke’s criticism of the rights of man in chapter 9 of her 1952 book *The Origins of Totalitarianism*.⁴³² Here, she agreed with Burke’s double insight: first that all rights depend upon laws, and second that all political legislation, hence the protection of rights, inescapably has a local character.⁴³³ Arendt, herself being forced to flee Nazi Germany because she was Jewish, was one of the earliest thinkers who recognized the

⁴²⁹ Ibid., 196.

⁴³⁰ Hence Burke’s famous statement that he prefers “the rights of Englishmen” which stem “from within the [English] nation” by way of legislation to the rights of man, Ibid., 149.

⁴³¹ Joseph de Maistre, *The Works of Joseph de Maistre*, ed. Jack Lively (New York: Macmillan Company, 1965), 80.

⁴³² In 1949, immediately after the newly founded United Nations had adopted the Universal Declaration of Human Rights in December 1948, Arendt published—first in English and afterwards in German—a short critique of the recent attempts to reanimate the idea of human rights. Here, Arendt pointed to the conceptual confusion in the declarations which would “invariably [lead] to philosophically absurd and politically unrealistic claims such as that each man is born with the inalienable right to unemployment insurance or an old age pension.” Arendt, “The Rights of Man”, 34 quoted in Christoph Menke, “The ‘Aporias of Human Rights’ and the ‘One Human Right’,” *Social Research: An International Quarterly* 74, no. 3 (2007): 739. She repeated and extended this criticism in Arendt, *The Origins of Totalitarianism*.

⁴³³ In Arendt’s words: “According to Burke, the rights which we enjoy spring “from within the nation,” so that neither natural law, nor divine command, nor any concept of mankind such as Robespierre’s “human race,” “the sovereign of the earth,” are needed as a source of law.” Ibid., 299.

dramatic transformations in the traditional understanding of rights with the rise of masses of refugees and stateless people after the Second World War. She objected to the fact that the modern concept of human rights merely repeats the traditional declarations of the eighteenth century despite the crisis that the idea of human rights faces in the totalitarian regimes of the 20th century.

Arendt claimed that the conception of human rights, based upon the assumed existence of a human being as such, breaks down at the very moment when we are confronted with people who have lost all their qualities (e.g. their citizenship, social status) and specific relationships except their humanity. “The world found nothing sacred in the *abstract* nakedness of being human.”⁴³⁴ Abstract nakedness of being nothing but human was the greatest danger for the victims of extermination and concentration camps, for stateless people and refugees. The human being who had lost her place in a political community, her political status in the struggle of her time, and her legal personality, is left with those qualities which can become articulated only in the sphere of private life and reduced to “mere existence” in all matters of public concern.⁴³⁵ Refugees, stateless people, asylum seekers and internally displaced people of the world are deprived of their “right to have rights” in Arendt’s famous formulation.⁴³⁶ Therefore, Arendt’s criticism of abstract human rights was that unless those ideas are connected with the political status of being the bearer of rights as a citizen they would remain “philosophically absurd and politically unrealistic claims.”⁴³⁷

The charge of abstraction is also popular in recent Hegelian and Aristotelian views which stress the importance of virtues or particularities of different traditions and communities against universal moral principles.⁴³⁸ What is the reasoning behind the charge of abstraction?

First, it is a charge against the importance given to principled thinking in moral matters. Ethics of principles in general and the theories of human rights in particular are often charged with “formalism and emptiness of practical reasoning that invokes principles or rules.”⁴³⁹ This charge of empty formalism is frequently levelled against Kantian ethics. It is said that the Kantian principle of duty in the Categorical Imperative lacks the determinate

⁴³⁴ Ibid, emphasis added.

⁴³⁵ Ibid., 301.

⁴³⁶ Ibid., 341, 343.

⁴³⁷ Arendt, “The Rights of Man”, 34 quoted in Menke, “The ‘Aporias of Human Rights’,” 739.

⁴³⁸ See, among others, Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers, Vol. II* (Cambridge University Press, 1985); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1981); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

⁴³⁹ O’Neill, “Abstraction, Idealization and Ideology in Ethics,” 57.

implication of action. Hence, one interpretation of the abstraction charge can be directed to the abstract principles of the rights, duties, etc. which do not give determinate answers as to how to behave in particular contexts. Those who criticize abstract, universal principles such as human rights defend local customs, practices and experiences against abstract principles. In this respect, the abstraction objection is connected to the universalism and particularism debate about moral reasoning in general and about human rights in particular. A universalism of abstract moral principles applying to everyone, everywhere and anytime is contrasted with particular norms and local conventions.

Second, as mentioned, Burke also criticized the abstract formulation of the *subject* of rights; the abstract view of man isolated from particular social and historical environments. As O'Neill argues, most of the time the abstraction objection is not directed only to the *abstraction* away from historical and social features but is also directed to the *idealization* of human agents in ethical and political theory. In this sense, she argues for a distinction between abstraction and idealization and claims that abstraction in itself is neither objectionable nor avoidable. The idealized perceptions of the human agent such as rational economic man, ideal moral spectators, utilitarian legislators underlying ethical theories, on the other hand, might be objectionable.⁴⁴⁰ These complaints about the abstract view of the subjects of rights form the core of Hegelian and Marxian criticisms of "abstract individualism" which resurface in recent objections to deontological liberalism.⁴⁴¹ I shall consider this individualism objection in the next sub-section.

5.2.2 The Individualism objection

Another classic critique of rights which continues to be influential in contemporary objections to human rights, especially among the political left, is Marx's critique of rights. Similar to Burke, Marx also thought that not abstract man but only concrete individuals, who are historically and socially determined by their class positions, exist.⁴⁴² In his work entitled 'On the Jewish Question' where Marx presented his famous attacks on the idea of the rights of man, he hints at the rights as being also *individualistic*. Looking at the representation of the so-called 'rights of man' in late eighteenth century first in the United States and then in

⁴⁴⁰ Ibid., 56.

⁴⁴¹ See Sandel, *Liberalism and the Limits of Justice*.

⁴⁴² Although both Burke and Marx criticized the abstract subject of the rights of man, their respective viewpoints were radically different; Burke's critique was a conservative and particularist one in the name of history of past tradition and concrete communities whereas Marx's critique was a universalist and revolutionary one in the name of the forward-looking history and true universality to be realized in the future against the false universality of human rights.

France, Marx asks “Who is *homme* as distinct from *citoyen*?”:

Let us notice first of all that the so-called rights of man, as distinct from the rights of the citizen, are simply the rights of a member of civil society, that is, of egoistic man, of man separated from other men and from the community.⁴⁴³

This paragraph is usually taken to be the heart of Marx’s radical critique of the rights of man—that of civil and political rights. Marx had the conviction that the idea of the rights of man provides a cover for the dissociation of individuals in society. Marx derives from these propositions a series of consequences for specific rights about the status of opinion, in particular religious opinion, liberty, equality, property and security. Freedoms of opinion and expression, according to Marx, are the spiritual equivalents of private property. Liberty defined in negative terms, as that of an individual’s right to do everything that harms no one else, is concerned with “the question of the liberty of man regarded as an isolated monad, withdrawn into himself.”⁴⁴⁴ The right to property makes every man see in other men the barrier to his freedom instead of the realization of his own freedom. Finally, the right to security, “the supreme social concept of civil society; the concept of police”, serves as an assurance of the egoist man (his person, rights and property).⁴⁴⁵ In sum, Marx denounces the rights of man as he claims that none of the so-called rights of man go beyond egoistic man, beyond man as a member of civil society—that is, an individual withdrawn into himself, separated from the community.

Burke and Marx criticized the abstract and individualist representation of the idea of the rights of man especially as they were proposed by the natural rights ideologues of their time. The doctrine of natural law was part of the early liberalism evolving under particular historical circumstances and major social transformations of the late seventeenth century such as the struggle against absolutism, the rise of the bourgeoisie, the reformation of the church and the decline of the traditional and hierarchally structured view of the world which is legitimated metaphysically. The objections of Burke and Marx that the rights of man are abstract, individualist and ahistorical echoes the objections raised by the proponents of the political conception against the naturalistic conception which I examined in section 2.5. The defenders of the political conception argued that the idea that human rights are rights all

⁴⁴³ Karl Marx, “On the Jewish Question,” in *The Marx-Engels Reader*, ed. Robert C. Tucker, 2nd ed. (New York: W.W. Norton, 1978), 42. By “civil society”, a phrase taken from Hegel, Marx refers to what he would later call bourgeois society or simply capitalism —roughly, the form of social organization characterized by generalized commodity production (including labor power as a commodity), private ownership of the means of production and accelerating industrialization. Marx seems to hold the idea that “rights of man” are valuable only for egoistic persons in a capitalist society.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid., 43.

people have—at all times and places—is too abstract and ahistorical and irrelevant to contemporary practices of human rights. Instead, they argued, human rights should be understood as part of international law and practice. However, the contemporary communitarian and Marxist objections to the discourse of rights not only attack the conception of human rights as natural rights but they are also attacking the very conceptual framework of rights within liberal political theory. When they criticize the abstractness and individualism of rights their target is the atomic conception of the person and the way the relationship between the individual, society and state is conceptualized within the liberal political theory. In this sense, the metaphysical abstractedness of the naturalist position and the legal positivist position of the practical view (especially the principle of the priority of right over the good which I will discuss below in connection to Rawls) fall within the same liberal corpus that is criticized. Communitarian and Marxist critics have different perceptions of the actual ‘nature’ of the person which they claim is ‘misread’ by liberal theory. But what they have in common is that they both criticize that the normative focus is attached to the ‘liberal self’ and the fact that liberal political theory is concerned with the defense of the rights of this individual which is herself an artificial product of the theory.⁴⁴⁶

Now, contemporary liberalism today proves to be a multifaceted set of (sometimes conflicting) political theories and doctrines with fundamental methodological and normative differences. Therefore, keeping in mind that liberalism is not a homogenous political and moral theory, one can argue that contemporary radical critiques of rights are directed to one particular version of liberalism and its conceptualization of power, namely pluralist liberalism and a juridical understanding of power.⁴⁴⁷ Correspondingly, the critique of the atomistic conception of the human being is directed especially to the liberal conception of the nature of the human which underlies the liberal theory of rights and the contract theory of the state. According to the liberal contract theory of the state, the political institution of the state is the outcome of a contract among free, equal and autonomous persons. The individuals entering the social contract have their identities and interests formed at a pre-political state of nature. Hence, the question of politics is a question of creating a legitimate political power and setting limits to it. Rights protect the agents’ freedom, circumscribing the individual which the state power shall not cross. In fact, according to Locke, we will “agree to leave the state of

⁴⁴⁶ Forst, *Contexts of Justice*, 6.

⁴⁴⁷ Samuel A. Chambers, “Giving up (on) Rights? The Future of Rights and the Project of Radical Democracy,” *Political Science* 48, no. 2 (2010): 185–200. By pluralist liberalism, I refer to views that accept the pluralism of incommensurable values (value pluralist) and that grants equal rights to liberty to everybody to pursue their own good.

nature—in which our freedom and equality and the sanctity of our life and property are protected by the law of nature—if we can take our natural rights with us.”⁴⁴⁸ Hence, liberal theory is dominated by a negative conceptualization of rights and freedom. Freedom is being free from power, and rights are protections against the infringement of this freedom. Of course this ideal juridical view of power is an ideal-type and the idea of the state of nature is not taken to be literally true. However, the critiques of the liberal conception of rights argue that this conceptualization of power and rights is dominant within the liberal theory of rights—both in early natural rights theorists such as Hobbes and Locke and within contemporary approaches such as Rawls’s.⁴⁴⁹

Without doubt, contemporary naturalistic conceptions have evolved a lot since the natural law views of Hobbes and Locke. There has been a process of secularization of the idea of natural law and there is no longer an explicit reference to a transcendental moral order. However the naturalistic conceptions continue to ground human rights on the notion of the ethical-personal autonomy of the individual. Human rights are seen as protection of an individual’s interests and (*ethical*) autonomy to pursue what he/she considers to be *good*. The defenders of the political conception criticize *ethical* justifications of the naturalistic conceptions (see sections 2.3.2 and 2.5.1) whereas communitarians and Marxists criticize the placement of the normative importance on the *individual*.⁴⁵⁰ However, as I will argue below, this critique can be directed not only against the naturalist conception but also against the political conception.

Political liberalism asserts the deontological principle of “the priority of the right over the good” at the face of plurality of comprehensive worldviews. The aim of political liberalism, in Rawls’s view, is to provide a political framework that is neutral between such comprehensive worldviews. Nevertheless, they also face the critique of atomic individualism. For instance, Charles Taylor, one of the contemporary communitarian critics of liberal theory’s

⁴⁴⁸ Ibid., 188.

⁴⁴⁹ It is perhaps relevant to mention here that the Hobbesian and Lockean characterization of the state of nature and natural rights envisaged at that state differ. According to Hobbes, in the state of nature, people have, in the Hohfeldian terminology, the liberty-right of self-preservation. It is a liberty-right in the sense that it does not impose correlative duties onto others to refrain from engendering other’s life. In fact, Hobbes pictured the state of nature as a war of everyone against everyone and the creation of political society meant that people renounced their rights and they subjected themselves to an authoritarian ruler. For this reason, some writers argue that Hobbes and most other medieval right theorists were *authoritarian* (they openly endorsed slavery and authoritarian rule) rather than *liberal*, cf. Tuck, *Natural Rights Theories*, 3. For Locke, on the other hand, the state of nature was not essentially a state of conflict. People had natural rights and duties, Hohfeldian claim-rights, supplied by God’s natural law and they carried their natural rights with them into the political society with the establishment of the political authority. The Lockean tradition regarded the primary function of government to be protecting people’s natural rights to life, liberty and property.

⁴⁵⁰ For instance according to Griffin’s theory there are no moral group rights so he argues that we cannot talk about human rights for groups such as self-determination, etc.

understanding of the ‘self’ argues that atomism represents a view about human nature and the human condition which renders the doctrine of the primacy of rights plausible.⁴⁵¹ Similarly, when Rawls used the theory of social contract in a modified form for constructing the principles of a theory of justice, there was a range of immediate objections that linked it with the atomistic perception of the individual.⁴⁵² Using Taylor’s thesis that liberal deontological theories are based on “situationless” and atomistic concepts of the subject, Michael Sandel provided a critique of Rawls’s theory of justice.⁴⁵³ He argues that Rawls’s theory is based on a conception of an “unencumbered self.” The parties of the original position, Sandel argues, are based on a “philosophical anthropology”; on a conception of the self as “a pure, unadulterated, essentially unencumbered subject of possession.”⁴⁵⁴ Rawls’s self is a subject of possession that has ends, values and conceptions of good and is not identical with these. The identity of this individuated self is antecedent to its environment and is not constituted by its relation to its surroundings and other selves. Moreover, Rawls insists on the essential plurality of human subjects with different ends and he faults utilitarianism for not taking the distinctiveness of people seriously and treating the whole society as one person.⁴⁵⁵ The plurality, Sandel claims, is essential for the idea of contract whether real or hypothetical because only a plurality of people can form a contract; I cannot, except in a metaphorical sense, make a contract with myself. However, Rawls unties the parties to the original position from their individuating characters by the assumption of the veil of ignorance. The assumption of the veil of ignorance means that the parties are assumed to be deprived of any knowledge of their place in society, their race, sex, or class, their wealth or income, their intelligence, strength, or other natural assets and abilities. Nor do they know their conceptions of the good, their values, aims, or purposes in life. Yet, these make the parties to the original position apparently identical parties. It, therefore, is not clear how the principles of justice are

⁴⁵¹ Charles Taylor, *Hegel and Modern Society* (Cambridge: Cambridge University Press, 1979), 189.

⁴⁵² Michael Teitelman, “The Limits of Individualism,” *The Journal of Philosophy* 69, no. 18 (1972): 545–56; Adina Schwartz, “Moral Neutrality and Primary Goods,” *Ethics* 83, no. 4 (1973): 294–307; Thomas Nagel, “Rawls on Justice,” in *Reading Rawls: Critical Studies on Rawls’ “A Theory of Justice,”* ed. Norman Daniels (Stanford: Stanford University Press, 1986), 1–16.

⁴⁵³ Taylor, *Hegel and Modern Society*, 157; Sandel, *Liberalism and the Limits of Justice*.

⁴⁵⁴ Sandel, *Liberalism and the Limits of Justice*, 92.

⁴⁵⁵ It might be argued that Rawls understood the participants in his original position *normatively* not *ontologically* (as communitarians believed). Extensive discussion of this point cannot be dealt with here. Because the system of rights Rawls constructs out of his original position in his *A Theory of Justice* is still in the realm of rights incurred by principles of *justice* in a liberal democracy. I am here interested more in the realm of human rights. In his *Law of Peoples*, Rawls attempts to extend the political conception of justice, with the help of a second original position, to the questions of law of peoples which comprises human rights that are not “politically parochial.” Rawls, *The Law of People*, 65. Hence, the communitarian critique of Rawls’s construction of systems of rights within liberal democracies can be applied, *mutatis mutandis*, to his view on human rights. Especially interesting in this connection is Rawls’s not including a “difference principle” for distributive justice between states.

agreed by way of a *contract*, even though it is a hypothetical one. In this sense, Sandel argues, Rawls's principle of "the priority of the right over the good", with the underlying theory of the self (constituted prior to communal ties and values) and the contractarian account of justification to be "puzzling and problematic."⁴⁵⁶

Similarly, international lawyer Martti Koskenniemi argues that the principle of the "priority of the right over the good" results in "a colonization of political culture" by technocratic rights- language that leaves no room for articulation of values and interests that are not translatable into that language.⁴⁵⁷ The rights-language, he argues, is based on an ideal of autonomy that perceives social conflict and morality in terms of interpersonal relationships: "for every right there is a correlative duty, and for every duty, there exists a correlative right."⁴⁵⁸ But, there are many normative demands that cannot be reduced to the duty-right relationship; for example, religions impose duties without designating correlative rights. Nor can aspirations to virtue or personal excellence, civic virtue or citizenship be translated or reduced to rights-language. Moreover, rights-talk perceives the matters of social and cultural goods such as peace, art, clean environment, health, education, etc. to be a matter of private interests and rights of the individual which fails to grasp the social meaning of those goods.

Hence, to the extent that they can be classified within this broad framework of the conceptualization of the individual and her rights within (pluralist) liberal theory, the communitarian critique of human rights can be directed to both naturalistic and political conceptions of human rights. Discourse-theory of morality, on the other hand, is not subject to the individualism objection to the degree that it sees issues which are matters of *intersubjective* conflicts to be matters relevant for morality. This is connected to the Habermasian division between morality and ethics. I will not get into that discussion for the moment. What is relevant for my discussion at this moment is that within the discourse theory of morality in general and the discourse-theoretic account of human rights in particular, the moral norms and principles are justified through a process of intersubjective justification rather than from the standpoint of a solitary individual. For this reason, the discourse-theoretic conception of human rights is not subject to the individualism charge, at least not to the same extent as naturalistic and political conceptions are.

⁴⁵⁶ Sandel, *Liberalism and the Limits of Justice*, 15.

⁴⁵⁷ Martti Koskenniemi, "The Effect of Rights on Political Culture," in *The EU and Human Rights*, ed. Phillip Alston, Mara Bustelo, and James Heenan (Oxford: Oxford University Press, 1999), 99.

⁴⁵⁸ Ibid., 102. Koskenniemi acknowledges that it is possible to question, from a conceptual point of view that, the necessity of such correlativity but the point is that rights seem socially effective (and, as such "real") often only if there are reflected somebody's (legally enforceable) duties. For instance, O'Neill defends this position which I will discuss in section 5.3.2. She however, acknowledges that there can be duties without corresponding rights, see O'Neill, *Towards Justice and Virtue*, 136–141.

5.2.3 The ethnocentrism objection

The ethnocentrism objection to human rights usually refers to their being *Western*. The criticism that human rights are Western usually takes two forms. The first form is about the historical genesis and normative validity of the notion. The concept of a right individuals have as human beings historically originated and evolved in the context of the secularization and modernization of the European community. Other communities did not have such a concept and tradition. The second form is about the ideological role of human rights: human rights reflect Western values and interests, they are used as a tool by Western societies to dominate non-Western societies (in this form criticism can be varied: human rights are (neo)colonial, imperial, capitalistic, etc.).

Criticism based on various combinations of these two forms of the claim that human rights are Western has been provided prominently by postcolonial scholars. They argue that the discourse of human rights is permeated by assertions of the moral and civilizational superiority of the West. Imperial and exploitative ambitions are concealed by the ideological use of the term human rights. For instance, in her essay “Human Rights in the 21st century: Take a Walk on the Dark Side”, Ratna Kapur argues that there is a dark side to the project of human rights. She claims that the abstract universality of human rights is in fact, a “discriminatory universality”. Claims to universality and inclusion of the Enlightenment project co-existed with exclusion and subordination; when Europe was in the midst of a struggle for liberty, equality and freedom, Europe’s ‘Others’ continued to be subjugated by colonialism and slavery.⁴⁵⁹ She claims that advocates of human rights need to embrace this colonial history. Asserting the universality of human rights while at the same time ignoring this dark side—the historical reality that the project of human rights incorporated (and continues to incorporate) arguments about the racial and religious superiority of the West—turns it into a “hegemonising move.”⁴⁶⁰ Another post-colonial thinker, Upendra Baxi, makes a similar point. He claims that the modern conception of human rights was based on the “discursive devices of Enlightenment rationality” which were in fact devices of “violent social of exclusion”. The ‘Rights of Man’ were human rights of all men capable of autonomous reason and will; and vast numbers of human beings were excluded by this peculiar ontological construction.⁴⁶¹ Post-colonial thinkers, like communitarians, also make

⁴⁵⁹ Ratna Kapur, “Human Rights in the 21st Century: Take a Walk on the Dark Side,” *Sydney Law Review* 28, no. 4 (2006): 673.

⁴⁶⁰ *Ibid.*, 674.

⁴⁶¹ Upendra Baxi, *The Future of Human Rights*, 2nd ed. (New Delhi: Oxford University Press, 2012), 44.

an objection to the “liberal subject” that lies at the heart of the human rights endeavor. This subject is “free, unencumbered, self-sufficient and rational, existing prior to history and social context.”⁴⁶² They also pointed that ‘the Other’ of the liberal subjects are excluded from the human rights project. In connection to human rights project this ‘Other’ is addressed at least in three ways: they are assimilated, tolerated or rejected. Hence the proclaimed universality of human rights in practice continued discriminatory practices.

As mentioned in chapter 2 (especially sections 2.3.2 and 2.5) the ethnocentrism or ‘parochialism’ objection has been frequently raised against the naturalistic conception of human rights. It is argued that the perception of the nature of the human person underlying the naturalistic conceptions is one that is biased towards one worldview (Western or liberal) and cannot be held by other worldviews. For instance, Griffin’s theory of human rights is grounded on the notion of normative agency which Griffin acknowledges as a value of the Enlightenment project of human rights. As discussed with respect to the criticisms of ethical justifications, it is subject to criticism if this emphasis on autonomy and agency will be held by non-Western or non-liberal worldviews. For instance, some people can give more importance to their duty to their community or a deity than their autonomy. It was exactly because of this possibility—of being perceived to be ethnocentric from various worldviews—that Rawls rejected the grounding of human rights on a religious or ethical perception of the nature of the person (what I called following Liao and Etinson, the ordinary moral reasoning concern in section 2.5.1).⁴⁶³ According to Rawls, if the law of peoples were justified by ordinary forms of moral reasoning, whether religious, philosophical, or moral, this may render the law of peoples unacceptable from the point of view of some well-ordered peoples who hold incompatible religious, philosophical, and moral views. The alternative to the political conception was either denying the necessity to provide any justification of human rights (e.g. Raz’s position) or accepting the moral importance of human rights yet leaving the matter of moral justification of both human rights or the international system of human rights open and unaddressed (e.g. the positions of Beitz, Pogge).

However, I think the options for philosophical thinking on human rights given the charge of ethnocentrism is not necessarily between ‘no justification at all’ and ‘an ethical justification with ethnocentrism charge’. It is possible to provide a moral *and* non-ethical justification of human rights which does not rely on a religious or ethical perception of the nature of the person. The moral justification of human rights on the right to justification provided by Forst

⁴⁶² Kapur, “Human Rights in the 21st Century,” 675.

⁴⁶³ Liao and Etinson, “Political and Naturalistic Conceptions of Human Rights,” sec. III.i, IV.i.

is such a justification.

As I discussed in section 3.6, Forst argues that focusing on the role of human rights as setting limits to sovereignty and standards for legitimate intervention is misleading as it misses the intranational purpose of human rights, namely their role in setting standards of *internal* political legitimacy. Rather, he argues, the primary perspective of human rights is from *inside*; human rights provide reasons for arranging a social and political structure in the right way; they do not provide concrete specifications for the arrangements of a society. Even the views labelled political tend to neglect that the primary perspective of human rights is from the inside, about the conditions and grounding of the internal legitimacy of a social and political structure. They rather take the perspective of an outsider who observes a political structure and asks whether there are grounds for intervention (as Beitz and Raz argue).

Grounding human rights on the right to justification, on the other hand, captures the political and social meaning of human rights as standing against older and modern forms of oppression and social exclusion. The moral point of human rights does not only lie in the protection of normative agency but also in expressing our normative agency and autonomy in a practical sense as *norm-givers*. The right to justification, in Forst's view, is a right to 'count' socially and politically, to be *authors* as well as *subjects* of rights. The understanding of human rights primarily from the point of internal legitimacy immunizes this conception of human rights from the charge of ethnocentrism without losing its moral authority. In Forst's words:

Thus it is possible for a conception of human rights to avoid the objection that it is an external invention or that it has an ethnocentric character without thereby losing its moral authority. Beyond contextualist particularism bias and context-indifferent globalism, this conception locates the primary goal and the meaning of human rights where they belong: in the heart of political discussions and conflicts about a more just social order — one that actually justifies itself to those who are its subjects.⁴⁶⁴

In the next chapter, I will defend a democratic account which justifies human rights on the right to justification interpreted as a right to resistance. Relying on Forst's justification strategy, the democratic account withstands the ethnocentrism objection to the extent that Forst's strategy of justification is immune from this objection.⁴⁶⁵

⁴⁶⁴ Forst, "The Basic Right to Justification," 56.

⁴⁶⁵ The ethnocentrism objection can still be raised to the discourse-theoretic conception of human rights, especially to the versions which are, in line with Habermas, based on a universal pragmatics reconstructed from the history of Western modernity and the moral development in the West. I will not go into this discussion here as it is beyond the scope of this dissertation.

5.2.4 The ideology objection

The *bourgeois* nature of human rights is critically analyzed most famously by Marx. As mentioned in the previous section, in his early essay *On the Jewish Question*, Marx argued that the rights of man as distinct from the rights of citizens were an insurance for the egoistic man in civil society: egoism, individualism and private property were central to the idea of the rights of man. Another aspect of Marx's detailed and nuanced critique of rights was that the rights of men were the dominant ideology of the bourgeois revolution. He argued that the ideal of universal rights of men promoted the class interest of the bourgeoisie in reality. Following Hegel, he claimed that the French Revolution split the unified social sphere of feudalism into a political domain which is confined to the state and a predominantly economic one, a civil society. The individuals were 'freed' from the communal bonds of the *ancien régime* and became atomized.⁴⁶⁶ In this context, the idea of rights of man and the principle of equality and liberty of all men are presented as ideological fictions whereas in reality they served to sustain the daily existence of exploitation and oppression. In his later works *Grundrisse* and *Capital* in which Marx examines the laws of capitalist production, he unfolds the connection of the ideas of equality and freedom to market exchange. He argues that the idea of formal/legal equality facilitates the constitution of the worker-capitalist relation and commodity production. It is required, for the capitalist accumulation to take place that capitalists and workers freely match in the market. The worker is free in the double sense: "as a free individual he can dispose of his labour-power as his own commodity, and that, on the other hand, he has no other commodity for sale, i.e. he is rid of them, he is free of all the objects needed for the realization of his labour-power."⁴⁶⁷ Marx describes how the natural rights of man, liberty and equality work in a market where self-interest rules in these words:

The sphere of circulation and commodity exchange, within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. It is the exclusive realm of Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, let us say of labour-power, are determined only by their own free will. They contract as free persons, who are equal before the law. Their contract is the final result in which their joint will finds a common legal expression. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to his own advantage. The only force bringing them together, and putting them into relation with each other, is the selfishness, the gain and the private interest of each.⁴⁶⁸

⁴⁶⁶ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000), 158.

⁴⁶⁷ Marx, *Capital: Volume 1: A Critique of Political Economy*, 272–273.

⁴⁶⁸ *Ibid.*, 280.

Hence, Marx argues that abstract notions of freedom, equality and rights of men, in reality, worked for the constitution of the ideological hegemony of the bourgeoisie within the capitalist system.

The bourgeois aspect of human rights is central to contemporary Marxist and post-Marxists criticism of especially liberal human rights discourse which gives a certain emphasis on the right to private property. Some critics of human rights argue that in the era of global capitalism, the discourse of human rights is used to legitimize the economic interests of powerful states. Marx's ideology critique is especially relevant when we think about the discussion of socio-economic rights. We can see that within the naturalistic conceptions of human rights the questions about socio-economic rights are treated mainly as questions relevant to conceptual matters (whether material substance is necessary for agency, freedom) unconnected to the structural economic relations. Whereas in Rawls's system of rights socio-economic rights are treated as derivative rights required to secure *civil* rights. In Habermas's system of rights socio-economic rights similarly have a derivative status ("can be justified only in relative terms") to secure *political* rights.⁴⁶⁹ These strategies result in the prioritizing of civil and political rights and attesting a secondary level to socio-economic rights which are derived from civil and political rights. The democratic account which I defend in the next chapter does not have this hierarchical conceptualization of negative/positive or socio-economic/civil-political rights. Hence, it will include socio-economic rights in the list of human rights and not as a 'derived' right. Before moving to this democratic account in the next chapter, let me analyze these conceptual objections to socio-economic rights in more detail in the next section.

5.3 Objections to socio-economic rights

Modern human rights declarations have extended the list of human rights to include 'new' rights which are usually categorized as socioeconomic or welfare rights. The final clauses of the United Nations' Declaration of Human Rights include several such rights which are further elaborated in the UN's International Covenant on Economic Social and Cultural Rights. They include rights to social security, including security in the event of unemployment, sickness, disability or old age, rights to food, housing and clothing, rights to medical care and education. They also include the right to work, to free choice of employment, to just and favorable conditions of employment and remuneration, to protection against unemployment, to form and join trade unions, to rest and leisure, including periodic

⁴⁶⁹ Habermas, "Remarks on Legitimation through Human Rights," 123.

holidays with pay.⁴⁷⁰

5.3.1 Historical background

Social rights pose a significant conceptual difficulty and practical challenge to the construction of rights as *individual* entitlements. Hence, their inclusion among human rights has been a source of controversy. Although inclusion of socio-economic rights in international statements of rights is historically recent (hence they are sometimes called ‘new’ rights), the idea is that there have always been struggles for their recognition as human rights. Some historical background can be illuminating to see that what is counted as a human or natural right has always been a matter of controversy and debate. When the demand of the rising bourgeoisie was voiced in the French Declaration of the Rights of Man and of the Citizen which limited those rights to males and free tax-payers, in other words, to male property owners, simultaneous demands also arose from the working and dispossessed classes.⁴⁷¹ There were demands for social equality and social rights during the 18th century revolutions. Gracchus Babeuf and his friends who defended the idea that the revolution of 1789 should be completed by a social revolution, claimed, in their *Manifesto of Equals*, a community of goods, “the common enjoyment of the fruits of the world”. They claimed that all differences among people other than sex and age need to be eliminated and there should be common food and common education for all.⁴⁷² The French constitution of 1793, in contrast to the 1789 Declaration, included general suffrage and the right to public office for all males. It also included an original statement of social rights in this form: “Public relief is a sacred debt. Society owes maintenance to unfortunate citizens, either procuring work for them or in providing the means of existence for those who are unable to labor.”⁴⁷³ This was the first time that ‘the right to work’ and ‘right to social security’ for those who cannot work was included, in an implicit manner, in a constitution. Nevertheless, this constitution could not be effectuated and supplemented by the Constitution of 1795 after the defeat of the Jacobins.⁴⁷⁴

⁴⁷⁰ Articles 23, 24, 25 and 26 of the Universal Declaration of Human Rights.

⁴⁷¹ At the same period, there were also demands for women’s rights such as “The Declaration of the Rights of Woman and the Female Citizen” written by Olympe de Gouges in 1791 and “A Vindication of the Rights of Woman” by Mary Wollstonecraft in 1792.

⁴⁷² *Manifesto of the Equals*, 1796. Available at <http://www.marxists.org/history/france/revolution/conspiracy-equals/1796/manifesto.htm> (visited on May 3, 2014).

⁴⁷³ 1793 Declaration of the Rights of Man and Citizen, Article 21. This Declaration is added to the beginning of the 1793 Constitution and accepted as the part of the constitution. The text of the declaration is available at <http://chnm.gmu.edu/revolution/d/297/> (visited on May 3, 2014).

⁴⁷⁴ Jacobins or the Jacobin club which was formally called the Society of the Friends of the Constitution (1789–92), or Society of the Jacobins (1792–94) was one of the most famous political groups of the French Revolution. Led by Maximilien de Robespierre, Jacobins became identified with extreme egalitarianism and violence and they led the Revolutionary government from June 1793 to July 1794.

The principle of the “right to work” (*droit au travail*) was established after the February Revolution of 1848 and its provisional government created “National Workshops” for the unemployed. Up to and after the founding of the International Workingmen’s Association (First International) in 1864, many workers’ associations and workers’ parties in Germany, France, England and Russia struggled for various rights and freedoms ranging from extension of the civil and political rights to proletarians and women, to freedom of association, to the right to health care, from the banning of child work to free child care and even free libraries. Therefore, demands for social rights have historically been connected to demands for political rights for the working classes and from the nineteenth century onward, radical and reformist socialists alike called for redefining the liberal agenda to include increased economic equity, the right to organize trade unions, child welfare, universal suffrage, restriction of the workday, the right to education and other social welfare rights.⁴⁷⁵

5.3.2 Contemporary philosophical critiques

It is important to bear in mind this historical record and that some of the struggles for universal suffrage, social justice and worker’s rights—principles endorsed in the Universal Declaration of Human Rights (articles 18-21) and in the two international Covenants adopted by the United Nations in 1966—were socialist in origin.⁴⁷⁶ After the Second World War, especially with the rise of modern welfare states throughout the Western countries, socio-economic rights entered the mainstream corpus of human rights. However, the representation of welfare rights as *human* rights proved to be controversial and has been the subject of persistent philosophical skepticism. We can classify objections to socioeconomic rights under (not mutually exclusive) three headings: *the nature-of-rights objection*, *the practicality-justiciability objection* and *the urgency-importance objection*. Let me present and analyze these objections here in turn.

According to the *nature-of-rights* objection, to speak of a right there must be a correlative duty. A rights claim entails a corresponding duty and obligation assigned to others: either a person/peoples or an institution. However, people who raise this concern argue that with respect to socioeconomic rights there are no clearly identifiable duty-bearers. Bernard Williams articulates such a worry specifically for labor rights. He argues that the fact that having the opportunity to work is a good thing does not mean that people have a right to

⁴⁷⁵ For a detailed historical analysis of the human rights legacy of the socialist and Marxist tradition, see Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2008), chap. 3.

⁴⁷⁶ *Ibid.*, 9.

work. “The problem is: against whom is this right held? Who is to be blamed if it is not observed?”⁴⁷⁷ Onora O’Neill, too, articulates such a concern; she argues that in order to talk about a right there must be corresponding *identifiable* duty-bearers (either all others or specified others). In the case of classic liberty rights the duty-bearers are all others and the duty is a *negative* duty of non-interference. However, in the case of socioeconomic goods (perceived as human rights) it is not possible to talk about the corresponding duty of all others of non-interference. There must also be *positive* action of other peoples or institutions to supply the goods in question.⁴⁷⁸ Maurice Cranston also thinks that it is not only the case that for every right there must be a duty bearer but human rights are universal and hence they are claims against *all* other individuals. My right to life for instance imposes a duty on all other individuals not to threaten my life. Socio-economic rights, on the other hand, are claimed from particular states or particular political communities so they are not universal in this sense.⁴⁷⁹

The *practicability* objection is concerned with the practical possibility of guaranteeing socio-economic rights. Cranston argues that practicability is the “first test” of both rights and duties. I cannot have a duty to do what is physically impossible for me to do. One cannot be said to have a duty to save a child drowning in the Charles River in Cambridge if that person was not at Cambridge at the time the child was drowning. This is equally true of duties; if it is impossible for a thing to be done, it is absurd to claim that it is a right. And, he claims that political and civil rights are not difficult and costly to institute. They require a system of law and simple legislation that recognizes those rights and negative duties on the part of other people: do not injure, arrest or imprison the person, “leave him alone: let him live as he decides to live and enjoy what is his; let him speak, meet with others, publish what he wishes, and worship as he chooses.”⁴⁸⁰ However, Cranston claims, it is different with the case of socio-economic rights; governments need to have access to great wealth to enforce them which is impossible to have. “How can governments of those parts of Asia, Africa, and South America, where industrialization has hardly begun, be reasonably called upon to provide social security and holidays with pay for the millions of people who inhabit those places and multiple so swiftly?”⁴⁸¹

Another objection to socio-economic rights, related to the practicability objection, which

⁴⁷⁷ Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2005), 64.

⁴⁷⁸ Onora O’Neill, “The Dark Side of Human Rights,” *International Affairs* 81, no. 2 (2005): 427–39.

⁴⁷⁹ Cranston, “Are There Any Human Rights?”

⁴⁸⁰ *Ibid.*, 13.

⁴⁸¹ *Ibid.*

comes not from philosophers but legal scholars, is that they are not judicially enforceable or they are not *justiciable*.⁴⁸² For example, in her work on social rights in the South African Constitution, Erica De Wet argues that meaningful judicial review is possible only if these rights are guaranteed as *individual subjective rights*, in other words, only if having the right to housing means that an individual can go to court and receive an order awarding him a house. De Wet asserts that the normative contents of social rights are too vague to be legally enforceable: a court would have no judicially discoverable standards by which to measure the state's compliance. She claims that the core values of political and civil rights, on the other hand, are more easily ascertained.⁴⁸³

Finally, the *urgency-importance* objection takes various shapes. Cranston, for example, asserts that social and economic rights will not pass the test of "paramount importance": "it is a paramount duty to relieve great stress, as it is not a paramount duty to give pleasure."⁴⁸⁴ Williams also offers arguments as to why socio-economic rights are not of the same paramount importance as civil and political rights. He believes that the clearest cases of human rights violations are those that amount to "unmediated coercion" and the violation is gross such that avoiding such coercion has urgency.⁴⁸⁵ According to the importance-urgency objection, it is not to deny socioeconomic goods have importance but rather that there is a hierarchy of importance. Nevertheless, the importance attached to socio-economic goods does not qualify them as human rights but as mere ideals or moral aspirations. Cranston and Williams also voice a political concern that thinking about socio-economic rights in terms of human rights decreases the effectiveness of the human rights discourse and thus may render it ineffective even when it is appropriate (i.e. for civil and political rights).⁴⁸⁶

⁴⁸² Justiciability refers to the ability of a court to adjudicate a dispute and order remedies for constitutional violations. According to Scott and Macklem, justiciability means: "the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfill a person's right. . . . Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability." Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 48—71 (1992)

⁴⁸³ Erika De Wet, *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa* (Butterworth, 1996), 41–42.

⁴⁸⁴ Cranston, *What Are Human Rights?*, 67.

⁴⁸⁵ Williams, *In the Beginning Was the Deed*, 73.

⁴⁸⁶ In Williams's words: "I think that it may be unfortunate that declarations of human rights have, though for understandable reasons, included supposed rights of this kind [positive rights]. Since in many cases governments cannot actually deliver what their peoples are said to have a right to, this encourages the idea that human rights represent simply aspirations", Williams, *In the Beginning Was the Deed*, 64.,

5.3.3 Responses to the philosophical critique

Various responses can be given to these objections. The immediate response is perhaps to the *importance-urgency claim*: material goods are essential to human life perhaps even more so than civil and political goods. A person lacking basic material necessities of food, clothing, shelter and health care would not be able to enjoy civil and political rights such as freedom of movement and public speech. Hence the test of paramount importance is not plausible to discredit socio-economic rights. Perhaps this is why even the minimalist theories in the contemporary human rights literature incorporate the basic welfare rights (like material subsistence) necessary to have agency, freedom, dignity into the corpus of human rights.

The *nature-of-rights* and *practicability* objections pose greater difficulty on the part of socio-economic rights. Yet, some responses can be, and have been, given. With respect to the nature-of-rights objection for instance, one can argue against the aforementioned connection between rights and duties. It might be argued that rights are not (1) necessary claims for *actions* of others, hence imposing duties (negative or positive) on the part of others and (2) rights do not *entail* duties but give *reasons* for the imposition of duties. (1) It can be asserted that they are instead, claims to *resources* (of course duties on the actions of others can follow from this claims of resources). This is particularly important with respect to socio-economic goods. When Locke asserted that there is a natural right to property, he argued that it is justified on the basis of “ownership of the person”. This is also called the self-ownership argument: “every man has a property in his own person: this no body has any right to but himself”. Following from this right to one’s body, he said the fruits of the labour of that body are also the property of the person: “The labour of his body, and the work of his hands, we may say, are properly his.”⁴⁸⁷ However the labour of the body interacts with natural materials to produce these fruits. At the face of the conditions under which those natural resources are scarce and unevenly distributed between people, one can claim entitlement to those resources.

Risse, as mentioned in chapter 3, provides an account of human rights from the standpoint of common ownership of the earth and on that account some socio-economic human rights (e.g. the right to work) are justified.⁴⁸⁸ (2) Rights and duties are not two sides of the same coin. Rights can be seen as protections of some aspects of those interests of humans that are of prominent importance that they give *reasons* for imposing duties on others. From the perspective of an interest view of rights which was examined in chapter 2, one can argue that

⁴⁸⁷ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), 9.

⁴⁸⁸ Risse, “Common Ownership of the Earth as a Non-Parochial Standpoint”; Risse, “A Right to Work? A Right to Leisure?”

there are rights which are derived from interests that are sufficiently important to impose duties on others. However, the proponents of the nature-of-rights objection hold a view closer to a choice perception of rights. According to the choice theory of rights having a right implies that the right-holder has control over another's duty. For instance, O'Neill argues that there is an asymmetry between liberty rights and welfare rights. This asymmetry, O'Neill argues, cannot be eliminated by saying that liberty rights, too, need positive duties and institutional structures for their enforcement.⁴⁸⁹ This is because welfare rights are unlike liberty rights: welfare rights are claimable and waivable *only* if a system of assigning agents to recipients has already been established and counterpart obligations are distributed. By contrast, liberty rights do not need institutional structures to be claimable and waivable.⁴⁹⁰ However, this distinction relies on a choice conception of rights. In fact, liberty-rights, in Hohfeldian terminology, have corresponding no-rights on the other parties. However it is possible to perceive human rights as a combination of Hohfeldian instances, which combine Hohfeldian claims, liberties, powers and immunities and are not necessarily limited to liberty rights. Similarly, it is possible to make a combination of choice and interest perception of rights and argue that the material interests of people are of paramount interest that gives *reasons* for claiming basic socio-economic goods as human rights and subsequently imposing duties on others.

With regards to the *practicability-judiciability* concern, one of the responses is that perhaps immediate practicability and judiciability are not necessary for a claim to be considered as a human right. It is reasonable to consider the feasibility conditions for a moral claim (i.e. ought implies can) and one cannot be obliged to do something beyond one's capacity. However, what it is in our capacity to do is a complicated question and it can be perfectly the case that the full realizability of civil and political rights can be as utopian as that of socio-economic rights. Moreover, as Amartya Sen argues, it is not a great embarrassment for ethical claims that they do not have the presumed precision of legal rights. The normative framework can allow the variations between what is called perfect and imperfect obligations and one can argue that some rights impose "loosely specified" imperfect obligations. Yet,

⁴⁸⁹ Henry Shue provides such an argument. He argues that most important liberty rights, such as the right not to be tortured, cannot be implemented without institutional structures for supervising police, courts, etc. For this reason the supposed distinction between liberty rights (with corresponding universal obligations of non-interference) and welfare rights to goods and services (which are found problematic because the corresponding obligations need positive actions which are unspecified) is illusory. Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980).

⁴⁹⁰ O'Neill, *Towards Justice and Virtue*, 131.

“loosely specified obligations should not be confused with having no obligations at all.”⁴⁹¹

For some rights, the obligations can be loosely specified. Still, Sen argues, imperfect obligations similarly correlate with rights as perfect obligations. The difference lies in the nature and form of the obligations not in the general correspondence between rights and obligations.⁴⁹² The overuse of rights language and perhaps conflicting rights claims as human rights might undermine the effective realization and exercise of human rights. However, this is a matter of political judgment and strategy, not conceptual determination.⁴⁹³ Socio-economic rights nevertheless might be included in the broad class of human rights, which impose both perfect and imperfect duties depending on the specific institutional arrangements.

In addition, Cranston’s objection that socio-economic rights are held against particular governments (which are not capable of guaranteeing them) applies *mutatis mutandis*, to civil and political rights. Those rights are also held against the respective governments. Recall Arendt’s claim that it was the greatest danger for the victims of extermination and concentration camps, for the stateless people and refugees to lose their citizenship status and protection of their respective states. But those atrocities experienced in the twentieth century showed that protections of those rights have been the subject of international concern and protection of those rights required international coordination. Similarly, at the end of World War I, the Treaty of Versailles codified the concern for labor rights at the international level and the International Labor Organization was founded to coordinate states, workers and employers. This was partly a result of the labor movement’s reaction to pitiful working condition caused by the industrial revolution. As the markets were internationalized, the working conditions were also affected by the conditions of relevant markets and required international remedy. Without the plausibility of effective regulation of labor conditions, we can still hold the claim that because of global capitalism and the resulting interconnectedness of the local economies the wellbeing of an individual is a subject of global (and moral) concern.

⁴⁹¹ Sen, “Elements of a Theory of Human Rights,” 341. Sen uses the Kantian distinction between perfect and imperfect obligations with respect to the obligations correlated to human rights. Perfect obligations are requirements that specific persons may have to perform particular acts, whereas imperfect obligations are requirements to which serious consideration is given by anyone in a position to provide reasonable help to the person whose human right is threatened, *Ibid.*, 338–342.

⁴⁹² *Ibid.*, 341.

⁴⁹³ Duncan Ivison, “Republican Human Rights?,” *European Journal of Political Theory* 9, no. 1 (2010): 46, n.37.

5.4 Which critique of human rights? Towards a dialectical understanding of human rights

What needs to be done in the face of persistent and various forms of skepticism against the idea of human rights in general and to socio-economic rights in particular? Can one still believe in the conceptual coherence and political efficacy of human rights given the fact that they are attacked from all sorts of directions by communitarians, conservatives, socialists, postcolonial thinkers, etc. for being abstract, individualist, Western, bourgeois, and so forth? If we cannot talk about *universal* human rights and worse, under the mask of emancipation, they serve to conceal and perpetuate oppression, exploitation and unequal relations of power, then shall we drop the talk and politics of human rights? This is the main the question of Samuel Chambers's article "Giving up (on) Rights?"⁴⁹⁴ Shall we give up rights? However, this question is in a certain sense rhetorical; even very strong critiques of rights and rights politics acknowledge the reality that rights are deep-rooted in our moral and political thinking and practices such that it is impossible to eliminate them from our moral and political vocabulary.

One possible reaction to these problems associated with the notion and politics of human rights is to take a position of what can be called *rights-pessimism*. This position emphasizes the problems and paradoxes the language and politics of rights offer. Wendy Brown recently articulated a powerful example of such a position, especially with respect to the identity-based rights. Combining the Marxist critique of rights with a Foucauldian analysis of disciplinary power, she argues that rights do not advance emancipatory aims, instead they offer paradoxes. She argues that appeals to rights for particular groups based on differences naturalize and depoliticize those differences. For example, to claim rights on behalf of women, such as the right to abortion or right to adjudicate sexual harassment, feminists must render the category of women legible to liberal legal norms. Yet, to do this means, in a Foucauldian vein, to subject the identity of women to regulatory norms. "To have a right as a woman is not to be free of being designated and subordinated by gender. Rather, while it may entail some protection from the most immobilizing features of that designation, it reinscribes the designation as it protects us, and thus enables our further regulation through that designation."⁴⁹⁵ Hence, rights can do more harm than good especially if they are closely bound to particular identities.

Another position to take can be what I call *moral agitation*. Theorists such as Kapur and Rorty seem to take this position; against the essentialist idea of universal human rights they

⁴⁹⁴ Chambers, "Giving up (on) Rights? The Future of Rights and the Project of Radical Democracy."

⁴⁹⁵ Wendy Brown, "Suffering Rights as Paradoxes," *Constellations* 7, no. 2 (2000): 232.

propose paying attention to the ‘particular’ and taking the suffering of that particular seriously. The unending task that lies ahead of us is, for Baxi, “one of *humanizing human rights*, going beyond rarefied discourse . . . to histories of individual and collective hurt. . . . To give language to pain, to experience the pain of the Other inside you, remains the task, always, of human rights narratology.”⁴⁹⁶ This position slides into a moralizing direction; voicing moral outrage and concern for the other, it brings unmediated particularity against the discriminatory universality. Rorty, in a different vein, argues a similar sentimentalist attitude to human rights. In his anti-foundational approaches to human rights, he argues that universal human rights are not to be based on a belief in a “metaphysical” idea of human rationality, but on a pragmatic idea of sensibility to cruelty.⁴⁹⁷ There also some mediocre positions of defending an intercultural translation of values and coming to a multicultural conception of human rights.⁴⁹⁸ Or, to refer to a core “thin morality” underlying human rights that is shareable by all cultures.⁴⁹⁹

It is my contention that it is a mistake to take generally and unequivocally one or the other position. For in any given case, one or more critiques of human rights may be sound, and also respectively the position to take might vary. One makes the situation too easy, if one *a priori* takes every single demand of human rights as a tool of emancipation or as a concealed attempt to oppress. One needs to look at who brings the demand, against whom and to what? And, if we want to keep the critical power of human rights we should not also be satisfied with attesting to local moralities and customs. We should examine the possibilities of developing a conception of human rights that is both culturally sensitive and culturally neutral; a conception which is *universally* valid and applicable to *particular* cases. This is perhaps the classic problem of the relation between universal and particular applied to the subject human rights. How to designate norms those are both context-immanent and context-transcending; they have to claim validity for a particular community but at the same time hold up a moral-critical stance to that community. In the next chapter, I will explore the possibility of developing an account of human rights that has a dynamic formulation of the relationship between the universal and particular.

⁴⁹⁶ Baxi, *The Future of Human Rights*, 159, emphasis original.

⁴⁹⁷ Rorty, “Human Rights, Rationality, and Sentimentality.”

⁴⁹⁸ See, for instance, Boaventura de Sousa Santos, “Toward a Multicultural conception of Human Rights,” in *Moral Imperialism: A Critical Anthology*, ed. Berta Hernández-Trujol (New York: New York University Press, 2002), 36-59.

⁴⁹⁹ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994).

5.5 Conclusion

In this chapter, I have examined some external criticism of the general discourse of human rights under the headings of abstraction, individualism, ethnocentrism and the ideology objections. I have also analyzed objections to socio-economic rights in particular. In the next chapter, I will argue for a democratic account of human rights that can withstand those objections and which can account for socio-economic rights as human rights without giving them a derivative status.

6 In Defense of a Democratic Account of Human Rights

6.1 Introduction

The two dominant ways of conceptualizing human rights do not properly account for the political significance of human rights: naturalistic conceptions slide into an understanding of human rights as pre-political moral principles whereas political conceptions perceive human rights as contingent standards of real politics. Moreover, these conceptions do not properly account for the political role and struggle aspect of human rights. The usual route taken by the naturalistic conception in order to answer whether a specific right is a human right is first to develop a philosophical account of human rights with ground, justification and content of human rights and then to compare that account with the main human right documents. Giving authority to moral theories in the determination of what counts as a human right, naturalistic approaches delegitimize everyday rights struggles (chapter 2). Political conceptions, on the other hand claim to emphasize practice rather than moral theory in the determination of what counts as human rights. However, by practice they mean the role of human rights in international relations, especially that of putting standards of state sovereignty and for legitimate intervention. In this sense, political conceptions miss the *intranational* purpose of human rights, namely their role in setting standards of internal political legitimacy, and cannot account for the social struggle aspect of human rights (chapter 3).

Discourse-theoretic accounts of human rights integrate both the moral and political aspects of human rights within a single conception of human rights. In this sense, they open a new way of philosophical thinking about human rights that goes beyond the naturalistic and political conceptions. Moreover, they integrate a principle of democracy in the justification of specific rights claims: according to the discourse theory of rights, norms can claim validity only if they are the outcome of the discourse of all possibly affected people. So construed, the specific meaning and force of human rights is perceived to be the outcome of a political struggle within the discourse-theoretic approaches. Therefore, they fare better than the naturalistic and political approaches in accounting for the social struggles aspect of human rights (chapter 4). However, as old as the philosophical thinking on human rights is the persistent skepticism of the notion and politics of human rights from various schools of thought such as communitarians, Marxists and post-colonial thinkers. They have claimed that the abstract, individualist discourse of human rights did not help to eliminate oppression,

domination and suffering and it may even perpetuate them (chapter 5). For postmodern critics, the discourse-theoretic accounts are not immune from these objections especially because of their focus on rational consensus (see Mouffe's critique discussed in section 4.6). These different conceptions of human rights, the main objections raised against them and their implications for the two cases I focused on are summarized in Table 2 below.⁵⁰⁰

According to the naturalistic conceptions human rights are grounded in a philosophical anthropology or understanding of human nature which is important enough to require protection by human rights. Gewirth posed action and the generic goods of action (freedom and well-being) as the justificatory basis for human rights. Griffin posed the normative agency as the ground that forms the basis of human rights. Tasioulas argued that there can be plural grounds for human rights. Defenders of the political conception objected to naturalistic views for being ahistorical and not taking the practice of human rights into account in their conceptualizations. They take the nature of human rights to be the role they play in international law and practice. Following Rawls's insight that different peoples with different comprehensive worldviews might not agree on the grounds of human rights but they can agree on the role they play, Beitz and Raz defended the view that the nature of human rights is constituted in their discursive role in international law and politics. Cohen and Risse, on the other hand, defended membership accounts of human rights whereby human rights define the contingent conditions of political membership in the global community. However, a dominant position within the political conception has been to limit the role of human rights to the standards of state sovereignty, violations of which can provide legitimate reasons for intervention. Especially defenders of the discourse-theoretic approach have criticized this exclusive focus on the role of human rights in international politics. Contrary to the political conception, defenders of the discourse theoretic accounts perceived human rights and popular sovereignty to be internally connected: human rights institutionalize the communicative conditions for democratic opinion and will formation in which the sovereignty of the people assumes a binding character.⁵⁰¹

⁵⁰⁰ The table has been filled in inductively by referring to some theoretical versions of different conceptions I discussed in the previous chapters. It does not have to be the case that all theories of human rights which are classified as a specific version of each conception have the same features with respect to these different components of the structure and mode of justification.

⁵⁰¹ Habermas, *Between Facts and Norms*, 104.

Table 2: Conceptions of human rights

<div>Conception of HR</div> <div>HR</div>	Naturalistic conception	Political conception	Discourse-Theoretic conception
HR are based /grounded in	<ul style="list-style-type: none"> *normative agency (Griffin) *pluralist accounts (Tasioulas) 	their role in international political-legal practice of; <ul style="list-style-type: none"> *justifying intervention *setting limits to sovereignty 	<ul style="list-style-type: none"> *basic moral right to justification (Forst) *the right to have rights (Benhabib)
Mode of justification	<ul style="list-style-type: none"> *ethical justification (Griffin) *monological moral justification (Gewirth) 	<ul style="list-style-type: none"> *public reason (Rawls) *no justification (Raz, Rorty) 	intersubjective (moral) justification
Content of HR	basic rights and practicalities (Griffin)	<ul style="list-style-type: none"> *minimum list (Rawls) *what is in the conventions 	criteria of reciprocity and generality
Duty-bearers	all people	Institutions; mainly states but also companies (e.g. Raz)	all people but as a political community
Objections to the conception	<ul style="list-style-type: none"> *ahistorical *irrelevant to practice *it is individualistic *it is ethnocentric (especially those with ethical justification) 	<ul style="list-style-type: none"> *has no substantial grounding of HR *it is state- and international relations-centric 	<ul style="list-style-type: none"> *it has no moral foundation (Habermas) *its justification is circular *it is consensus-centric
Implications for the specific rights to work and housing	The moral principle or moral theory is authoritative in the decision whether there is a right to work or housing.	International law and the role of human rights in setting the limits to state sovereignty are authoritative.	Citizens's debates and argumentation for specific rights are authoritative.

Discourse-theoretic accounts such as Benhabib's and Forst's, provide intersubjective justification of human rights by grounding them on a moral right or principle which is derived from a speech-act-immanent obligation of speakers to give reasons for the validity claims they make in their utterances. According to discourse-theoretic accounts, rights are necessarily social or political from the beginning; they are not given *a priori* or natural. They are not held by individuals prior to social interaction; rather they are recognized as the presuppositions of

intersubjective relations of collective will formation.⁵⁰² Although, in this way, discourse-theoretic accounts can answer some of the objections like the individualism or ethnocentrism objections, they have been subject to other objections such as that they are circular, they are consensus- and reason-based.

In this chapter, I explore the possibility of developing an account of human rights that goes beyond the naturalistic and political conceptions of human rights and that can answer some general critiques of human rights such as the individualism objection and the ethnocentrism objection and the consensus-centrism objection directed at the discourse-theoretic accounts. I call this the *democratic* account of human rights. It is *democratic* in two senses. The first is democratic in the *conceptual* sense; there is an internal connection between human rights and democracy. The second is in the *political* sense; human rights have a political role in democratic politics. The moral grounding of human rights I offer is an interpretation of Forst's basic right to justification as a right to resistance. What I propose is a modification of the right to justification into a right to resistance whereby I show how in concrete rights-struggles the abstract right to justification is instantiated as a right to resistance. It is my contention that in virtue of this modification it is possible to demonstrate how Forst's abstract right to justification can be used in concrete political struggles for rights for justifying the rights claims that arise as a denial of bad justifications.

In what follows, I will lay out some of the key theoretical elements of such an account. The *democratic* perspective of human rights is threefold. First, it conceives an internal connection between democracy and human rights (section 6.2). Second, it grounds human rights on the right to justification, which can take the form of the right to resistance in real-life rights struggles (section 6.3). Third, the democratic account has an understanding of human rights which conceives social rights as human rights and it also embraces the political significance of human rights within democratic politics (section 6.4).

The democratic account of human rights, in my understanding, has the following characteristics. First, it incorporates the element of dissent (in addition to consensus) and political contestation into the justification of human rights, hence it allows conceptualization of human rights as 'struggle concepts' justified in real-life rights struggles. Second, it does not make a hierarchy between civil and political human rights and socio-economic rights, whereby socio-economic rights have a lower status (in the sense that they are derived from

⁵⁰² Michael Shortall, *Human Rights and Moral Reasoning: A Comparative Investigation by Way of Three Theorists and Their Respective Traditions of Enquiry: John Finnis, Ronald Dworkin and Jürgen Habermas* (Gregorian Biblical BookShop, 2009), 259.

civil and political rights). Third, it understands human rights as constitutive of democratic politics. This means struggles for rights are part of democracies, democracy understood as including agonistic elements such as conflict, contestation and power struggles. From this perspective, one can think of human rights having re-iterated universality: as a constitutive element of democracy and an open-ended process of collective will formation, human rights are subject to continuous reformulation and transformation.

It is crucial, for the purposes of this dissertation, to reflect on how the democratic account of human rights perceives struggles for specific rights claims in general and the cases for the right to work and right to housing which have been my main focus. This will be the concern of section 6.6. The democratic account does not fall prey neither to the ethnocentrism, individualism and ideology objections nor the consensus-centrism objection that is directed at discourse-theoretic accounts (section 6.5). Yet, other objections might still be posed to the democratic conception of human rights which I will briefly address in section 6.7.

6.2 The co-originality of human rights and democracy

The mainstream literature on human rights and democracy is to a large extent divided.⁵⁰³ Human rights as moral claims are universally valid; they transgress the boundaries of political communities. Democracy, on the other hand, takes for granted some kind of *demos*. This division can be discerned in the naturalistic and political conceptions of human rights. According to naturalistic and political conceptions, the question of the relation of human rights to democracy is the question whether there is a human right to democracy. Or is democracy necessary for the realization of human rights?

As mentioned before, some prominent versions of the political conception of human rights do not count democratic rights as human rights.⁵⁰⁴ Democratic rights are not included in Rawls's list of human rights (as part of a law of peoples). Similarly, Joshua Cohen makes a distinction between rights implied by justice and human rights and then he argues that there is not a human right to democracy.⁵⁰⁵ Similarly, Griffin, the prominent defender of a naturalist

⁵⁰³ Eva Erman makes such a claim in Erman, *Human Rights And Democracy*, 7.

⁵⁰⁴ By democratic rights I mean both rights of political participation such as the right to vote and to be elected, the right to take part in the conduct of public affairs and a number of other rights which are thought to be essential for democracy such as the right to freedom of opinion and expression (article 19 of the Universal Declaration); and the right to freedom of peaceful assembly and association (article 20 of the Universal Declaration).

⁵⁰⁵ Cohen, "Is There a Human Right to Democracy?."

conception, also claims that it is unlikely that there is a human right to democracy.⁵⁰⁶ For the discourse-theoretic conception of human rights on the other hand there is a *conceptual* connection between human rights and democracy. That connection is theorized as ‘co-originality’, ‘internal connection’, or ‘mutual constitution’. I have discussed Habermas’ thesis that human rights and popular sovereignty are internally linked within the reconstruction of the system of rights before (see section 4.2.1). Here I will briefly revisit Habermas’s argument and then extend it to a different argument by Claude Lefort who also perceives an internal connection between human rights and democracy though he understands democracy differently than Habermas.

In the Universal Declaration, democratic participation is in fact recognized as one of the human rights, whether in the less explicit form that it takes in Article 21 of the Declaration of Human Rights or in its fuller formulation in Article 25 of the International Covenant on Civil and Political Rights, although neither article uses the term ‘democracy’ itself. Article 21 of the Declaration approaches a conception of democratic political participation by stating that:

- 1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- 2) Everyone has the right of equal access to public service in his country.
- 3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The somewhat more explicit version in Article 25 of the Covenant states that:

Every citizen shall have the right and the opportunity, without . . . Unreasonable Restrictions

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

A number of other rights which are thought to be essential for democracy such as the right to freedom of opinion and expression (article 19); and the right to freedom of peaceful assembly and association (article 20) are included in the Universal Declaration and following

⁵⁰⁶ In fact, Griffin’s question is not whether democracy is a human right, rather “Do human rights require democracy?” And his answer is “Yes and No, depending upon circumstances” , Griffin, *On Human Rights*, sec. 14.4.

covenants. Much can be said about the conception of democracy envisaged by these documents. The famous distinction between the *concept* and *conception* of X (applied to justice, human rights so far) is also applied to democracy. As a *concept*, democracy is understood to be popular self-rule; a mode of decision-making about collectively binding rules and policies over which people exercise control. There are also different *conceptions* (or theories) of democracy, which have different claims about how much democracy is desirable or practicable, and how it might be realized in a sustainable institutional form.⁵⁰⁷

Liberal democracy perceives some components of liberalism to be indispensable to democracy at the level of the nation state, such as securing basic freedoms and individual rights, separation of powers between executive, legislature and judiciary and the related idea of the rule of law, representative assembly elected by popular and periodic elections, the principle of limited state, and a separation between the public and private spheres. The experience of authoritarian and totalitarian regimes have proved, in a bitter way, that attacking those elements (e.g. attacking individual rights in the name of popular will, the collective good or the realization of a higher form of freedom, attacking the separation of powers in the name of people's justice) threatened democracy itself. However there have been subsequent struggles between liberals and other democrats. Socialists and social democrats have argued that formal political rights and freedoms proved to be of limited value if major economic decisions taken by private institutions are beyond the control of people. In a parallel manner, feminists have argued that the private spheres of the family and gender relations are not free from power and they need democratization as well. Furthermore, under conditions of globalization, some commentators argued that the power of nation-states declined such that governments are unable to exercise the necessary authority to secure democratic outcomes or offer protection for human rights, most notably, but not exclusively, claims for economic and social rights.⁵⁰⁸ Instead of creating a post-cold war order that offers the prospect of protecting human rights through democracy and the rule of law, for some commentators globalisation has created the conditions for disorder, authoritarian rule beyond the territorial state, the reformation of the state entity and the potential for continued violations of human rights.⁵⁰⁹ In this context, some argue that "we must treat the claim that human rights and democracy share

⁵⁰⁷ David Beetham, "Liberal Democracy and the Limits of Democratization," *Political Studies* 40, no. s1 (1992): 41. Keith Graham also makes a distinction between a general *concept* of democracy and rival conceptions of it in Keith Graham, *The Battle of Democracy: Conflict, Consensus and the Individual* (Brighton: Wheatsheaf Books, 1986), 8.

⁵⁰⁸ Stephen Gill, "Globalization, Democratization and Indifference," in *Globalization: Critical Reflections*, ed. James H. Mittelman (Boulder: Lynne Rienner, 1996), 105–128.

⁵⁰⁹ Robert McCorquodale and Richard Fairbrother, "Globalization and Human Rights," *Human Rights Quarterly* 21, no. 3 (1999): 758.

a symbiotic relationship with great caution.”⁵¹⁰

What is important for my purposes here is to go beyond the truism that democracy is one of the human rights or the empirical question of whether (liberal) democracies are the most effective means of securing human rights.⁵¹¹ Instead, I aim to examine the *conceptual* relation between democracy and human rights without limiting the former to liberal democracy and the latter to civil and political rights.⁵¹² Is it possible to develop a conception that accounts for the political role of human rights as an interior criterion of legitimacy without thereby losing their moral importance?

An analysis of the conceptual link between democracy and human rights, formulated variously as ‘co-originality’, ‘equiprimordiality’, and ‘mutual constitution’, has been pursued within different philosophical traditions. The basic insight that connects law and popular sovereignty, namely the idea that if people are subjects of the law (i.e. if the law binds them) they must also be the makers of it is closely associated with classical and contemporary republican positions. In *The Social Contract*, Rousseau persuasively defended that political legitimacy rests on the will of the people. However, Rousseau also maintained that there must be some constraints on democratic decisions. It was Habermas in the contemporary republican (Kantian) tradition, who argued for a reconciliation between the principle of (democratic) republicanism—the public autonomy of citizens—and the liberties of private individuals, between popular sovereignty and human rights.⁵¹³ In *Between Facts and Norms*, Habermas

⁵¹⁰ Tony Evans, “If Democracy, Then Human Rights?,” *Third World Quarterly* 22, no. 4 (2001): 623.

⁵¹¹ Here by (legal) truism, I am referring to a strong legal positivist stance which ties the existence and justification of a right (democratic rights in this case) to its being inscribed into law.

⁵¹² This does not necessarily preclude the possibility that one can derive the conclusions such as that there is a human right to democracy and human rights need democracy to be realized from an analysis of this conceptual link.

⁵¹³ Habermas, *Between Facts and Norms*, 267–74, 298–304. The link between popular sovereignty and the legitimacy of law and justification of human rights has also been noted by contemporary republican approaches such as those of Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008); Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, Clarendon (Oxford: Oxford University Press, 1997). I cannot go into details of these positions as it is beyond the scope of this dissertation. For an analysis of the republican accounts of human rights see, Duncan Ivison, “Republican Human Rights?,” *European Journal of Political Theory* 9, no. 1 (2010): 31–47; Simon Hope, “Republicanism: A Theory of Freedom and Government,” *Cambridge Review of International Affairs* 21, no. 3 (2008): 367–82. However, it is important to note that the democratic conception I am arguing for is different from contemporary civic republican positions which ground human rights on civic virtues such as Stuart White’s account which grounds human rights on the civic virtue of patriotism, Stuart White, “Republicanism, Patriotism, and Global Justice,” in *Forms of Justice*, ed. Daniel Bell and Avner De-Shalit (London: Rowman and Littlefield, 2002), 251–68. This is because, as I will discuss below, the democratic conception does not ground human rights on virtues or common values. Moreover, considering Forst’s distinction between constitutional Kantianism and republican Kantianism, the democratic approach is closer to republican Kantianism. Constitutional Kantianism sets out basic moral principles of justice that represent the substantive basis for any legitimate constitution and legislation. Republican Kantianism, on the other hand, seeks to transform the moral level of justification into procedures of political self-legislation and attaches justice more to the democratic legitimation of norms and laws rather than to general principles. Forst, *The Right to Justification*, 101. The democratic conception remains closer to republican

pursues an analysis of the “co-originality of rights and democracy” (see section 4.2).⁵¹⁴

Habermas argues that one cannot impose human rights as external limitations on state sovereignty and also cannot make human rights instrumental to state sovereignty. Instead there is an internal connection between human rights and state-sovereignty. As, mentioned in chapter 4, Habermas’s claims on the legality of human rights have been subject to objections from some scholars such as Pogge and Benhabib.

Is it possible to have an understanding of the internal connection between human rights and democracy that does not limit human rights to the legal system or process of constitution-making and does not limit democracy to the institutionalization of this process? I think one can develop such an understanding following the footsteps of French political theorist Claude Lefort who has also pursued an analysis of the ‘co-originality of rights and democracy’.

In an original interpretation of Marx’s critique of rights, Lefort suggests that Marx himself is “captivated by the bourgeois ideology of the rights of man” which he criticized.⁵¹⁵ Lefort argues that Marx is mistaken in confusing the ideological dimension of rights with the idea of rights or in his terminology with the ‘symbolic dimension of rights’. According to Lefort, Marx was rightly pointing out the ideological function of right’s talk that it transposes and disguises the relations of domination and exploitation – which is an analysis that I endorse. However he ignored its symbolic dimension.

From the moment rights of man are posited as the ultimate reference, Lefort argues, the language of rights (and with it a certain abstract and indeterminate conception of man as the bearer of rights) has become a constitutive element of political society. For Lefort, democracy and rights mutually suppose one another; human rights bear an internal and indissoluble relation to a conception of democracy. In fact, they are “one of the generative principles of democracy.”⁵¹⁶ This interpretation of rights by Lefort suggests a *dialectical* relationship between their abstract universality and the concrete particularity rather than an undialectical opposition between the universal and the particular.⁵¹⁷

Moreover, and most important for our own purposes here, the struggle for human rights

Kantianism than to constitutional Kantianism to the degree that human rights norms are justified democratically by intersubjective procedures of general and reciprocal justification instead of being derived from general moral principles. Nevertheless, it differs from the Habermasian type of republican Kantianism to the degree that it accounts for the moral content of human rights by grounding it on the right to justification. As such, it offers an alternative combination of moral and political constructivism.

⁵¹⁴ Jürgen Habermas, *Between Facts and Norms* (Cambridge, MA: The MIT Press, 1996), chap. 3.

⁵¹⁵ Claude Lefort, “Politics and Human Rights,” in *The Political Forms of Modern Society* (Cambridge, MA: MIT press, 1986), 252.

⁵¹⁶ *Ibid.*, 260.

⁵¹⁷ Kenneth Baynes, “Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights,” *Political Theory* 28, no. 4 (2000): 451–468.

makes a new relation to politics possible. Lefort emphasizes that once rights are ‘declared’, they belong to the sphere of the political and provide a critical principle for their constant reformulation and introduction of new rights. For Lefort, democracy and rights mutually presuppose one another in a way that the relation between the universal (the abstract idea of human rights) and the particular (particular needs, demand, identities) are open to contestation and continuous revision or reformulation.

[Democracy] tests out rights which have not yet been incorporated in it, it is the theatre of a contestation, whose object cannot be reduced to the preservation of a tacitly established pact but which takes form in centres that power cannot entirely master. From the legal recognition of strikes or trade unions, to rights relative to work or to social security, there has developed on the basis of the rights of man a whole history that transgresses the boundaries with which the state claimed to define itself, a history that remains open.⁵¹⁸

The conceptual link between democracy and human rights (variously identified as co-originality, equiprimordiality, mutual constitution, etc.) is one of the building blocks of the account of human rights which I argue for. This is because making the connection between human rights and democracy allows incorporating a principle or procedure that accounts for right-holders not being only subjects but also *authors* of rights. As I will explain in more detail in the next section, a democratic justification of a human right norm means that it has the general and reciprocal consent of those who are influenced by the norm. So construed, the specific meaning and force of human rights is perceived to be the outcome of a political struggle.⁵¹⁹

Despite accounting for the co-originality of human rights and democracy, Habermas does not give a moral justification of human rights. Although he appeals to the dual nature of human rights in relation to law and morality, he asserts: “the concept of human rights does not have its origins in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are juridical *by their very nature*.”⁵²⁰ Habermas uses a combination of the legal principle and discourse principle for his logical genesis of rights (see section 4.2.1). Notwithstanding his acknowledgement of the moral side of human rights, he does not provide a moral justification of human rights or a

⁵¹⁸ Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Cambridge: MIT press, 1986), 258.

⁵¹⁹ David Ingram, “Of Sweatshops and Subsistence: Habermas on Human Rights,” *Ethics & Global Politics* 2, no. 3 (2009): 193–217. The question of the link between democracy and human rights is also related to oppositions of philosophy and politics, and among different methodological approaches to the study of the principles of legitimate exercise of political rule and views about the status of theory in politics. I have examined different positions on these matters and their implication for different conceptions of human rights and the treatment of specific rights claims by different conceptions of human rights in sections 2.4, 3.5 and 4.6. I will look at the democratic conceptualization’s implications for specific right-claims in section 6.6.

⁵²⁰ Habermas, *The Inclusion of the Other: Studies in Political Theory*, 190, emphasis original.

justification of his systems of rights; instead he relies on the juridical essence of rights.⁵²¹ Lefort, on the other hand, does not belong to the philosophical tradition of giving justifications of moral principles and ideas. I will argue that it is possible to construct an account of human rights which combines this perception of co-originality of human rights and democracy with a *moral* justification of human rights.

6.3 The justification: the right to resistance

Habermas's discourse principle is mainly a principle of consent; it emphasizes the consent of those affected to the norms and actions. Forst's principle of justification incorporates dissent, since the right to justification accords to each moral person "a *veto right* against basic norms, arrangements, or structures that cannot be justified reciprocally and generally to him or her."⁵²² In this section, I shall argue that this negative formulation of a veto right can be interpreted as a right to resistance: a right to denounce unjust structures and orders one is subjected to.⁵²³

Perhaps a clarificatory remark is in place here. When I say a *negative* formulation of the right to justification, I do not use the term *negative* as it is used in the distinction between negative and positive rights defended frequently by libertarians. According to this distinction a negative right is a right not to be subjected to an action and it implies that others have negative duties to avoid certain actions. A positive right, on the other hand, is a right to be subjected to an action and it implies that other people have positive duties to take certain actions.⁵²⁴ In contrast, when I say a *negative* formulation of the right to justification, I mean

⁵²¹ As mentioned in section 4.2.2, In his later works, Habermas talks of the concept of dignity as a basis of rights, but he does not provide a moral justification of human rights based on the notion of dignity. Cf. Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights."

⁵²² Forst, *The Right to Justification*, 6.

⁵²³ The seeds of the right to resistance as a ground for human rights were first thrown into my thinking when Costas Douzinas commented that the proper understanding of Arendtian right to have rights is an understanding of one fundamental right to resistance underlying all rights claims during a session on human rights in Cosmopolitanism and Conflict Conference (Rome, October 2013). Although Douzinas does not talk about such a right in his previous work on human rights, he recently elaborated on the idea by talking about "a right to event", Costas Douzinas, "The 'Right to the Event'. The Legality and Morality of Revolution and Resistance," *Metodo: International Studies in Phenomenology and Philosophy* 2, no. 1 (January 02, 2014): 151–67. Although there are similarities between my argument and Douzinas's, my argument differs from Douzinas's in the sense that I suggest that it is the right to justification that underlies human rights and it entails a right to resistance when it is not fulfilled.

⁵²⁴ As mentioned before Henry Shue criticized this distinction arguing that even negative rights (e.g. right not to be killed) can incur a mixture of both negative and positive, Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), chap. 1,2. Making a similar criticism James Sterba argues that depending on the linguistic formulation any right can appear as a negative or positive right. For instance, a right to welfare can be defined as "the liberty of the poor not to be interfered with in taking from the surplus possessions of the rich what is necessary to satisfy their basic needs", James P. Sterba, "Our Basic Human Right Is a Right to Liberty and It Leads to Equality," in *Ethics: The Big Questions*, ed. James P. Sterba (John Wiley & Sons, 2009), 288.

that the basis of rights is the critique or negation of an experience of wrong treatment such as experience of injustice or domination. In other words, the claim of the right in question defined *negatively* (*liberation* from those structures that are unjust, dominates, violates rights, etc.). The right to justification is interpreted as a negative notion (the *other* or *absence* of injustice, domination) in this sense of being a reaction to what is perceived as an injustice, domination, etc. In the cases on which I focused in chapter 1, the participants in the real-life rights struggles formulate their reactions to a policy, an experience of injustice, domination, etc. in the form of rights claims.

Turning back to the right to resistance, the emergence of the right to resistance and right to revolution is a long-term and complex process that goes back to Greek tyrannicides and Monarchomachs. The classical political theorist Josiah Ober argues that the revolutionary uprising of the citizens of Athens in 508-507 BC was an important moment for the establishment of the form of government that would soon come to be called *dēmokratía*. Using Hannah Arendt's imagery, Ober argues that the Athenian revolution "marks the moment at which the demos stepped onto the historical stage as actor in its own right and under its own name".⁵²⁵

Discussions about rights to resistance and revolution have been made during other revolutionary moments in history such as during the French Revolution, the Glorious Revolution and the American Revolution among others. The right of revolution was included in the preface to the French Constitution of 1793. This preface contained a declaration of the rights of man and citizen including right to rebellion in §35: "When the government violates the rights of the people, insurrection is for the people, and for every portion thereof, the most sacred of rights and the most indispensable of duties."⁵²⁶ Similarly, it was expressed in the United States Declaration of Independence in 1776 that the people were "endowed by their Creator with certain unalienable Rights" and could alter or abolish government "destructive" of those rights.⁵²⁷

Philosophers of the period such as Locke, Kant and Hegel supported revolutions historically. Nevertheless, they (especially German idealists) were reluctant to incorporate an explicit right

⁵²⁵ Josiah Ober, "Revolution Matters: Democracy as Deontic Action," in *Democracy 2005: Questions and Challenges*, ed. Ian Morris and Kurt A. Raaflaub (Iowa: Kendall/Hunt Publishing Company, 1997), 70.

⁵²⁶ Available at <http://www.columbia.edu/~iw6/docs/dec1793.html> (visited on 13/06/2013).

⁵²⁷ The U.S. Declaration of Independence (1776) was written by primarily by Thomas Jefferson, revised by John Adams and Benjamin Franklin and after the final revisions made by the Congress; it is signed by the Congress on July 4, 1777. The title of the document was "A Declaration by the Representatives of the United States of America, in General Congress assembled". Reprinted in Carl Lotus Becker, *The Declaration of Independence: A Study on the History of Political Ideas* (New York: Harcourt, Brace and Co., 1922), 4,8. Available online at <http://oll.libertyfund.org/Home3/Book.php?recordID=0034> (visited on 07/02/2015)

in their philosophical system of rights. In *Two Treatises of Government*, Locke affirmed a natural right to revolution:

[W]hensoever the *Legislators endeavor to take away, and destroy the Property of the People*, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence. Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, *endeavor to grasp themselves, or put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they *forfeit the Power*, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty.⁵²⁸

The historical support for revolution stemmed from the idea that when there was an oppressive order and a tyranny it is legitimate to overthrow (through revolutions) that order and to put in place a new social order. Most nation-states are formed through such revolutions or wars of independence. However, when an order is put in place such as a state and a constitution is formed, there is no place for a right to revolution within that constitution. The rule of law is constructed through the historical fact of revolution but the right to revolution as part of that law cannot be justified formally.

I shall offer a weaker moral right to resistance as the ground of human rights in the sense that the grounding right to justification when it is not honored entails a right to resistance. I do not put it as a right to revolution for the following reasons. Contemporary rights struggles which is the main starting point of this dissertation, do not target the central state power in the sense of overthrowing the social order and its political authority and building a new one. Yet, it is also not *a priori* denied as a possibility that combination of different forms of resistance accompanied by mass support can turn into a revolution in some political conditions and historical circumstances. Nevertheless, I take it to be that it is a sense of being done injustice and wrong, which sparks the struggles for rights. Rights are not just matters of giving consent to norms and institutions imposed on one, but they are also matters of dissent: a matter of raising a *veto* against unjust norms and institutions and an aspiration to change it.

If we recall Forst's foundational right to justification:

The insight into the *principle of justification* corresponds to a practical insight into the fundamental moral right to justification of each person (and the unconditional moral duty of justification), a right that grants persons a moral veto against unjustified actions or norms.⁵²⁹

Forst acknowledges the *social* aspect of human rights, namely that whenever they are claimed, they have been a voice of protest to forms of oppression and/or exploitation.

According to Forst, this social aspect of human rights can be analyzed on the basis of the

⁵²⁸ Locke, *Two Treaties of Government*, 412 (chap.19, sec.222), emphasis original.

⁵²⁹ Forst, *The Right to Justification*, 67.

principle of justification:

Claims for social equality and recognition, in whatever particular language they have been expressed (and they always come in a “thick” form), did and do follow a dynamic that can be analyzed; on the basis of the principle of justification: in social and political conflicts; people questioned the reasons that could no longer, in their eyes, legitimate existing relations of power and domination.⁵³⁰

The negative interpretation of the right to justification as a right to resistance can then be formulated in the following way:

1) The (ideal) moral right to justification entails a right to resistance in non-ideal circumstances if the right to justification is not honored.

In circumstances of social and political conflicts, people pose a claim that reasons given for the forms of oppression or exploitation are not good reasons (they do not fulfill the criteria of generality or reciprocity or they are denied to be given at all), and therefore their right to justification is not honored. In these contexts, the resistance of people (whether it is formulated in terms of rights or justice) is *grounded* on their right to justification. This can also be seen as the moral right to justification is the fundamental principle of morality and in practical (non-ideal) circumstances in which this right to justification is not fulfilled a right to resistance is justified.

This formulation requires some elucidation. By ‘non-ideal circumstances’, I mean concrete forms and practices of justification where a justification that can gain the assent of all affected people is not given. The moral right to justification is an abstract right that transcends the concrete practices of justification aiming at an ideal justification that gain assent by all free and equal people. This moral right to justification when not fulfilled (the ideal justification is not given) serves as “a deep normative grammar of social conflict and emancipatory aims” by providing a structure of asking for better justifications.⁵³¹ So in my understanding the ideal right to justification is a ‘regulative idea’ that imprints a critical power to concrete practices to search for better justifications.

A more radical formulation can be:

2) The fundamental right to resistance (which is prior to the right to justification) entails both the right to justification (engaging in discursive forms of action of demanding and giving reasons) and non-discursive forms of action (e.g. civil disobedience, mass revolt, etc.).

⁵³⁰ Ibid., 154.

⁵³¹ Forst, “Justifying Justification: Reply to My Critics,” 184.

In other words, one can argue that the right to resistance rather than the right to justification is the fundamental or the grounding right. I do not endorse such a position, because in my view, the right to justification as Forst constructs it has firm-enough grounding and it allows to account for a right to resistance in virtue of the fact that it incorporates a *veto* right. However, there are some scholars who perceive the right to resistance to be the fundamental or basic right that underpins all human rights.

Costas Douzinas, for instance, seems to hold such a position. He argues that there is “an indelible right to resistance” and revolution as the modern expression of free action has become a normative principle.⁵³² For Douzinas, there is a pre-discursive and metaphysical source of the right to resistance.⁵³³ Then, the question is how this fundamental right to resistance is grounded? Douzinas talks of two “metaphysical resources”, the publicly recognized will and a right founded *contra fatum* on “a will that wills what does not exist.”⁵³⁴ But, in his formulation this source or sources remain mysterious. He sometimes talks about a moral idea of autonomy that motivates individuals to resist existing forms of domination and oppression. At the same time although these individual starting points of resistance from a concern for autonomy are collectivized, there always remain an excess which is not incorporated in the legal form. This excess gives the dynamic that the right to resistance always returns; hence there is “the eternal return of resistance and revolution.”⁵³⁵ To avoid this elusive and mysterious concept of the source (or sources) of the right to resistance, I suggest the following formulation.

3) *The (ideal) moral right to justification entails a right to resistance in non-ideal circumstances if the right to justification is not honored. The right to resistance can be claimed in discursive and/or non-discursive forms.*

In practical contexts, the right to justification is instantiated as a right to resistance, a negation of bad justifications of, for example, policies, rules, social structures one is subjected to. Therefore, each person’s right to ask for reasons for norms imposed on him or her is the fundamental moral right which underlies rights claims. In circumstances when people question the legitimacy of policies and conditions imposed on them they can ask for

⁵³²Costas Douzinas, “Philosophy and the Right to Resistance,” in *The Meaning of Rights: The Philosophy and Social Theory of Human Rights*, ed. Costas Douzinas and Conor Gearty (Cambridge: Cambridge University Press, 2014), 105. Douzinas however does not explicitly say that this right to resistance grounds all human rights or the right to justification or any other right for that matter will be derived from the right to resistance. His claim is that although in the liberal philosophy it is argued otherwise there is an indelible right to resistance and it is a right that cannot be incorporated into the legal system.

⁵³³ In his formulation it is the right to even that which comprises the right to resistance and revolution.

⁵³⁴ Douzinas, “The ‘Right to the Event’,” 165.

⁵³⁵ Ibid.

justifications; they can ask for reasons. If they are denied justifications or they judge the reasons to be invalid or bad reasons, then a right to resistance is entailed in such non-ideal circumstances. Moreover, this right to resistance is not necessarily practiced in discursive forms (such as engaging in discourse, etc.) but can also take non-discursive forms (such as civil disobedience, blockades and occupations). Douzinas mentions that contemporary acts of resistance, insurrection and revolt such as in Tunis, Cairo, Athens and Istanbul did not demand the reopening of debate nor did they prioritize the defense of fundamental rights. Instead, the aim of changing the operation and scope of politics is central to democratic disobedience.⁵³⁶ To give another example, the residents in Dikmen Valley in Ankara that I discussed in chapter 1, started a meeting with the local authorities. However, in one of their meetings the mayor of Ankara left the meeting. Hence one side withdrew from the engagement in discourse and the discourse was interrupted. As a result, the residents practiced civil disobedience and they refused to leave their houses when the authorities came to demolish them. One can multiply such examples but what is important is that all these forms of resistance (discursive, non-discursive, reasoned argumentation or passionate performance) can be analyzed through the dynamic that the right to justification of the people in question were not honored.

6.4 The content, universality and political role of human rights

In the previous section, I examined the grounding right to justification of the democratic account which is interpreted as implying a right to resistance. Here, I will examine the features of the democratic account in relation to (a) content, (b) universality and (c) the political role of human rights.

a) *Human rights are social and social rights are human rights.* Firstly, I shall explain why human rights are social along the democratic account. The right to resistance is a moral right in the sense that it expresses the critical aspiration in every situation and social order, that those who are wronged by the structural inequalities, oppression or discrimination in that situation have the moral right to dissent and act to change that structure. However, this right is not derived from a normative importance attached to the human individual, its agency, dignity, etc. Although every human individual has this right, the right and its justification are *social* in two senses. First, it is based on an intersubjective justification; human rights are seen as the result of intersubjective, discursive construction of rights claims that cannot be reciprocally and generally denied between persons who respect one another's right to

⁵³⁶ Ibid., 159.

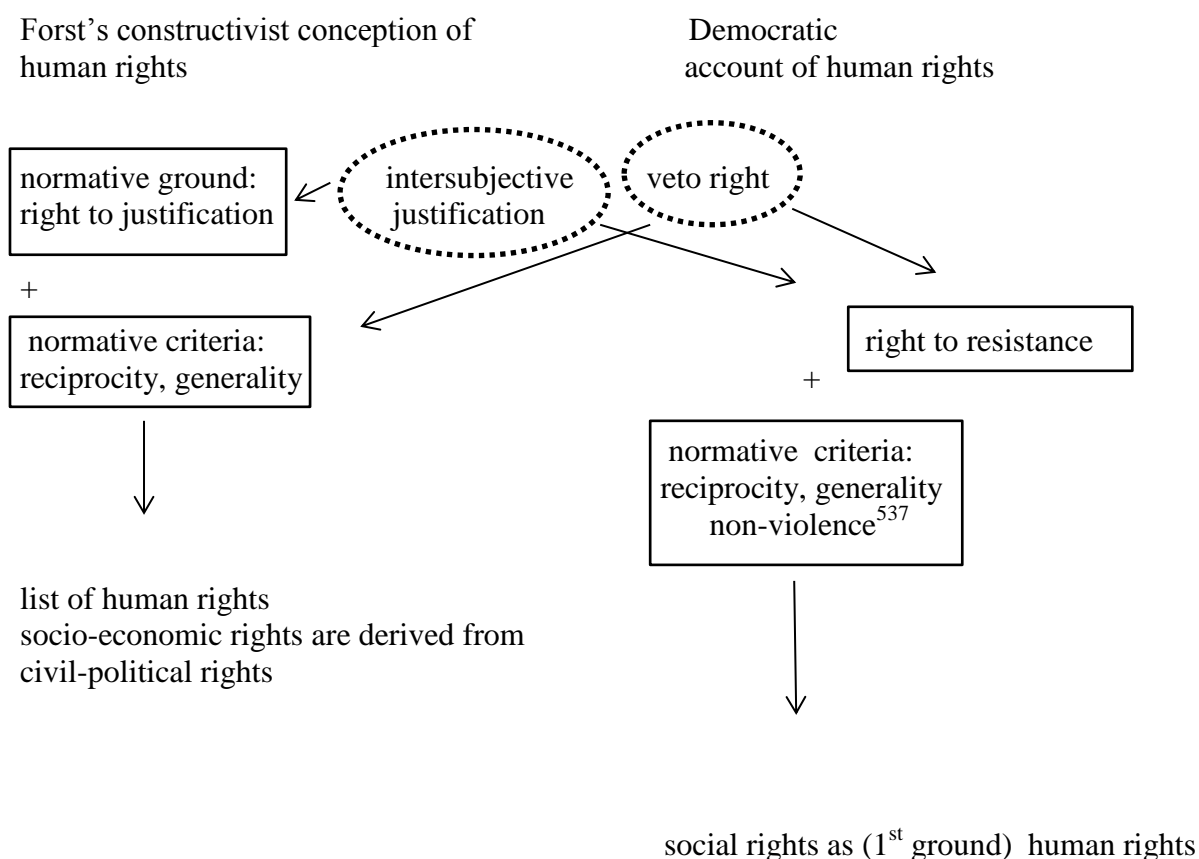
justification. Second, the right is social in the sense of being a right to resist collectively constituted unjust social relations and structures. I will explain more about the social aspect of human rights when I examine the objections in the next section.

Secondly, I will examine the feature that social rights are human rights. A justification of human rights on the basis of the right to justification (and hence also on the right to resistance) does not impose a hierarchy among different types of rights. As I mentioned in the previous chapter, other conceptions of human rights have a hierarchal ordering of different categories of rights in their justification such that civil and political rights come first and social and economic rights are derived from them or justified with respect to them. In the dominant paradigm of human rights civil rights are prioritized as genuine human rights. Some political rights like democratic rights and socio-economic rights even more so are thought to be derived from those basic rights. This is the case in political and naturalistic conceptions of rights and also in Habermas's logical genesis of rights. For the naturalistic conceptions, in the old natural law school only negative rights, which have correlative negative duties, are genuine rights (recall the nature-of-rights objection to socio-economic rights). Contemporary versions of the naturalistic conception such as Griffin's include basic socio-economic rights like the right to subsistence as part of human rights because they think it is necessary for agency. For the political conception the reasons for limiting the list of human rights are rather different; they focus on the main role of human rights as setting standards to legitimate intervention to internal sovereignty of states. Hence, socio-economic rights are usually not included in the list of human rights. The democratic account of human rights, by contrast does not have such a hierarchical relation between rights. If the economic structure and material relations of production and distribution dominant in a society creates grave injustices of structural inequality and oppression, there is not an *a priori* principle that precludes that the resistance to such structural inequality and oppression is articulated in a rights claim of an economic sort. Table 3 represents this non-derivative status of social rights within the democratic conception

b) Humans rights have re-iterated universality. The interpretation of the right to justification—that it is instantiated as a right to resistance—allows conceptualizing the universality and particularity of human rights in a dialectical manner. The right to resistance is universal in the sense of an empty placeholder; it is a moving moral aspiration that motivates criticism of wrongs. It is not substantiated with a comprehensive or metaphysical worldview. Yet, it has a re-iterated universality; the idea of universality is re-iterated in every particular

rights claim as a human right without referring to a fixed substantive content. This understanding of the universality of human rights gives not only to consensus and agreement but also to dissent and conflict a central place in thinking about both human rights and democracy. It also keeps the moral justification provided by Forst. In this sense it forges a synthesis between discourse-theoretic justification of human rights and the tradition of radical democracy. I will examine this feature of the democratic account in the next section where I review the responses to the consensus-centrism objection to discourse-theoretic accounts of human rights.

Table 3: The right to resistance and the grounding of human rights



c) Human rights are constitutive of democratic politics. An understanding of human rights as grounded in the right to justification as entailing a right to resistance embraces the political role of human rights within democratic politics. In this sense the realm of rights is

⁵³⁷ One can possibly think that in the transition from the right to justification to the right to resistance, the criteria of reciprocity and generality can lead to a criterion of non-violence in the sense that the violent forms of resistance are filtered out. The defense of a non-violence criterion goes beyond the scope of this dissertation.

not conceptualized as a pre-political sphere of moral rights based on metaphysical or naturalistic grounds. Such naturalistic conceptions take the politics of human rights as a politics of implementation and institutionalization of moral human rights, their embodiment in law and public culture. According to the democratic account's understanding of human rights, on the other hand, morality is not a realm which is pre-political or distinct from the political; rather morality cuts across political and practical spheres. The right to justification serves as a dynamic referent within political and practical contexts.

As mentioned at the beginning of this chapter Lefort refers to this dialectical relation between rights and politics. Here, it can be helpful to compare the democratic conception I proposed with some similar approaches to human rights such as those put forward by scholars like Christophe Menke, Étienne Balibar and James Ingram. All these three scholars propose an alternative understanding of Hannah Arendt's view on human rights.

According to Christophe Menke, Arendt's criticism of the idea of human rights needs to be understood as "*internally* linked to an alternative understanding of the idea of a human right" whose premises "do not depend upon the traditions of modern natural law or liberalism, but put into question the essential, basic presuppositions of these traditions."⁵³⁸ According to Menke, by her criticism of the declaration of human rights, Arendt was hinting to this endeavor's aporetic character: equality is not an attribute of people as individual natural beings but as political members.⁵³⁹ Hence, demanding equal rights for human beings as natural beings who are essentially non-equal is aporetic. In Menke's words:

There are only equal rights for political members, which are thus not *human* rights. And there are only different needs or claims of human beings as natural beings, and these are thus not human *rights*. The idea of human rights is a contradiction in terms.⁵⁴⁰

According to Menke, by showing the declarations' failure to distinguish between the rights of man and the rights of a member of a polity, Arendt shows the urgent need to make this distinction rather than demonstrating that the distinction is untenable. Arendt's famous notion of the right to have rights indeed makes this distinction. It delineates the one human right, the right to have rights that are derived from membership in a political community. Menke claims that, according to Arendt, this right to have rights is, as distinct from the "so-called Rights of Man", indeed the "only" human right, "the one right without which no other can

⁵³⁸ Menke, "The 'Aporias of Human Rights' and the 'One Human Right'," 741. For an overview of Arendt's criticism to the idea of human rights, see section 5.2.1.

⁵³⁹ Cf. "We are not born equal, we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights", Arendt, *The Origins of Totalitarianism*, 301.

⁵⁴⁰ Menke, "The 'Aporias of Human Rights'," 746, emphasizes original.

materialize.”⁵⁴¹ Hence, there is the one basic human right of every human being to membership in a political community.

However, if this human right to membership does not already presuppose the status of membership but have it as its object, where can it be traced back? In other words, where is this right to membership founded? Menke argues that there are two premature ideas for the origin of this right in Arendt’s writing. The first idea is to trace back the fundamental right to membership to the constitution of humankind as a political entity. According to this solution the human right to have rights is the fundamental right brought forth by an international law which through mutual agreement and guarantee constitutes humankind as a ‘political entity’. According to Menke, this solution simply turns back the substitution of a ‘historical’ law by a ‘natural’ law which the traditional declaration of human rights had undertaken. The one human right is traced back to the historical fact of a political entity of humankind. Moreover, the linking of the human right to have rights to an act of legislation of the political entity of humankind contradicts Arendt’s own insight that it was precisely the historical development of such an entity that dramatically aggravated the situation of the excluded and stateless, a situation which human rights were meant to counteract. There is no guarantee that a politically constituted humanity would not also commit the same acts of expatriation that are today done by regionally limited political communities.⁵⁴²

A more promising source for tracing back the human right to membership, Menke argues, is a concept that Arendt only in passing mentions, the concept of ‘human dignity’. Arendt introduces the notion of human dignity to designate what lies prior to “all so-called Rights of Man”: “Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.”⁵⁴³ Connecting this remark by Arendt with her other remarks about the concept of human dignity whose content is understood to be the politico-linguistic existence of human beings, Menke argues that we should provide an understanding of the concept of human dignity that does not relapse into the natural law understanding of human dignity as a natural property human beings are endowed with individually. We should break with the naturalization of human rights, without however, positivistically or historically equating human rights with the regulations of a new, postnational, international law.⁵⁴⁴ For this, Menke argues we should provide a concept of human dignity that “introduces an entirely different

⁵⁴¹ Arendt, *The Rights of Man: What are They?*, 37 quoted in *Ibid.*, 748.

⁵⁴² *Ibid.*, 750–751.

⁵⁴³ Arendt, *The Origins of Totalitarianism*, 297.

⁵⁴⁴ Menke, “The ‘Aporias of Human Rights’,” 753.

anthropology than that of modern natural law, namely an anthropology of politico-linguistic form of life as opposed to an anthropology of quasi-natural “needs” or “interests”.⁵⁴⁵

Grounding human rights on one basic right to justification (which entails a right to resistance), has such an anthropology. According to an understanding of human existence as one of justificatory beings, human rights are predicated on a notion of dignity which is understood in relational terms, i.e. human beings essentially have dignity through, with and vis-à-vis others in their speaking, acting and judging capacities of giving and asking for justifications. According to the democratic account, dignity is bestowed on individual human beings neither by their nature, God or reason (as naturalistic conceptions claim) nor by the historical or institutional inscription in law (as political conceptions claim) but it is “a general characteristic of the human condition”; of the politico-linguistic existence of the human being.⁵⁴⁶ This aspect of the democratic account’s delineating a ground and politics of human rights that is alternative to naturalistic and political conceptions can be further clarified by taking on board some other interpretations of Arendt’s notion of the right to have rights.

Étienne Balibar, for example, in his article entitled “Hannah Arendt, The Right to Have Rights, and Civic Disobedience” attempts to reconstruct what in his view may be Arendt’s central philosophical problem: that of “the politics of human rights and its foundation, or rather its absence of foundation, its unfounded character.”⁵⁴⁷ Balibar claims that according to a radical interpretation of Arendt’s view on human rights, dissidence—in the specifically modern form of civic disobedience—is made the touchstone of the founding of rights. Hence, according to Balibar human rights is an antimonic conception with “a principle of disobedience or dissidence is included at the heart of obedience.”⁵⁴⁸ To the extent that the principle of justification incorporates an element of resistance, dissidence, my position is similar to Balibar’s position. However, while Balibar defends a ‘groundless’ idea of human rights, I reflect this questioning of a static ground onto itself. The right to justification with its denial entailing a right to resistance provides a dynamic grounding for human rights.

Finally, similar to my aim to propose an approach of human rights that accounts for the struggles aspect of human rights within real-life rights struggles, James Ingram also offers an understanding of the politics of human rights as an active, critical democratic politics from the viewpoint of the bearers of rights. Ingram compares this understanding of ‘human rights

⁵⁴⁵ Ibid., 756.

⁵⁴⁶ Arendt, *The Origins of Totalitarianism*, 297.

⁵⁴⁷ Étienne Balibar, “Hannah Arendt, The Right to Have Rights, And Civic Disobedience,” in *Equaliberty: Political Essays* (Duke University Press, 2014), 166.

⁵⁴⁸ Étienne Balibar, *Equaliberty: Political Essays* (Duke University Press, 2014), 178.

politics as democratic action' with two other understandings which he labels as 'human rights politics as implementation' and 'human rights politics as right'. On the first view, which Ingram associates with Weber, politics involves the use of power to achieve certain ends, and the politics of human rights is understood as the use of power to advance the moral imperative of protecting these rights. However, this combination of universalistic moral aspirations with a statist conception of power raises the paradoxical situation that for the implementation of human rights for failed states a greater power than the one that is oppressing must intervene on behalf of those oppressed. However in this way, the call for protecting people from state power leads to the risk being subjected to a greater power. Moreover, this dependence of rights and their bearers to a superior power contradicts the idea that rights express a principle of autonomy and equality.

On the second understanding of human rights which Ingram associates with Kant, human rights are moral imperatives which should be embodied in institutions. Here law takes up the burden the first view leaves to power. Habermas and Benhabib hold such an understanding: they see in the spread of regional and international legal regimes which limit state sovereignty, the chances for human rights protection. Ingram argues that although the second understanding offers an ideal to aim for, it offers no guidelines on how these institutions are to be created or maintained. In order to fill this gap between fact and norm, Ingram offers the third understanding of the politics of human rights as democratic action. Human rights, on this account are a principle internal to politics that identifies human rights politics first and foremost by the activity of rights claimants.⁵⁴⁹

This understanding of the politics of human rights as democratic action is very similar to my understanding of the politics of human rights to be constitutive of democratic politics. Shifting the focus from morality or law to politics, democratic conception of human rights see the potential right-bearers as "the authors of their rights in a deeper sense—not only ideally, from the standpoint of justification, and not only within the framework of a constitutional state, but actually, as they engage in the practice of claiming rights."⁵⁵⁰

6.5 Responses to specific objections to human rights

In chapter 5, I examined the most common objections proposed to human rights in general and socio-economic rights in particular. Some of the objections were that human rights are abstract,

⁵⁴⁹ James D. Ingram, "What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights," *American Political Science Review* 102, no. 4 (2008): 412–413.

⁵⁵⁰ *Ibid.*, 408.

individualist, ethnocentric and ideological. The democratic account, in my view, is not susceptible to these objections, at least not to the same extent as other conceptions. First, the democratic account is less vulnerable to the *abstraction* objection. Indeed, by claiming that the abstract right to justification is instantiated in the form of the right to resistance in practical contexts and within rights struggles it shows how this abstract right is claimed in practice. The rights struggles, in this sense, can be considered as concrete practices of justification in which the abstract right to justification is instantiated and concretized as a right to resistance to bad (or no) justifications.

Second, as claimed above (a) in section 6.4, according to the democratic conception human rights are moral norms that are justifiable from the viewpoint of all those possibly affected. As participants in the practice of reciprocal justification—of reason-giving and reason-asking practice—participants are not passive recipients of rights but active authors of them. Unlike the classical liberal theory of rights, according to the democratic conception, human rights are not understood as pre-political moral rights that circumscribe the liberties of each individual from the interference of others and the state. Demands for rights and the right-making process is a relational, intersubjective process with a moral core based on the right to justification and a political concretization of this right in specific contexts. Hence, the democratic conception is not susceptible to the *individualism* objection because it embraces the intersubjective and relational aspects of human rights.

Finally, the democratic conception of human rights does not fall prey to the charge of *ethnocentrism*. In contrast to some naturalistic conceptions, the democratic conception of human rights does not ground human rights on a notion of human nature or on a comprehensive worldview. The right to justification is neutral to any conception of the good. It also does not rely on an empirical or hypothetical moral denominator among different cultures. The right to justification is an unconditional moral right substantiated by a practical insight into the principle of justification and in non-ideal circumstances it implies the right to resistance. In this sense, unlike ethical or religious justifications of human rights, the democratic conception is not biased toward one conception of the good life. Demands for justification and resistance to injustices and oppression can arise in all societies and contexts. One cannot claim that the demands in the name of human rights are an imposition of Western or liberal values on non-Western or non-liberal societies if there are internal demands and moral claims in the name of rights within those societies. If such societies claim to have cultural integrity and a notion of the common good to which human rights are foreign, that common good must be legitimate from the viewpoint of insiders to that society if it claims to have integrity. The primary political

context where the moral right to justification is practiced is the domestic society. If some citizens raise demands for justifications of the social and political structure and policies that affect their rights in the currency of rights claims, one cannot say that such a demand for rights is an external imposition or ethnocentric.⁵⁵¹

Apart from these objections to the idea of human rights in general, the democratic account is not susceptible to the *consensus-centrism* objection raised against the discourse-theoretic account. To the extent that conflict and dissent over different rights claims and their justifiability is expressed in rights-struggles (for instance in the form of asking for justifications for the institutions, law and policies implemented and denouncing bad justifications), the democratic account can precisely incorporate elements of conflict and dissent into an understanding and justification of human rights due to the prominent role it assigns to the right to resistance.

6.6 Revisiting the cases

A democratic account of human rights based on the right to justification understood as taking the form of the right to resistance starts from practice, namely the raising of a right-claim in a concrete political context. However this account justifies any rights claim based on the moral core underlying human rights, namely the right to justification understood as a right to resistance. It is important to note that saying that human rights are grounded on one basic moral right, namely the right to justification does not mean that specific rights are ‘derived’ from this basic right. It only serves as a moral core, as the basis of the justification of concrete rights. Which specific rights claims are not ‘reasonably rejected’ is a matter of political construction and intersubjective establishment in the political context. So with respect to the right to housing and right to work claims, the point is not whether these rights can be derived from a right to justification, but rather whether the right to justification can serve as a normative referent behind the concrete rights struggles.⁵⁵² It is my contention that it can.

According to the democratic account, the specific force and content of human rights is perceived to be the outcome of a political struggle. The naturalistic conceptions, by contrast derive the specific rights from ethical principles or from the importance attached to humanity.

⁵⁵¹ For a similar argument for the claim that a conception of human rights based on the right to justification is not vulnerable to the ethnocentrism charge, see Forst, “The Basic Right to Justification,” sec. I.

⁵⁵² The term “normative referent” is a phrase Jean Cohen uses with respect to the use of idea of human rights within social movements as a reference point, Cohen, “Rethinking Human Rights,” 580. I use it with respect to a two-tiered political and moral construction of the right to justification: the moral right to justification is utilized and realized in concrete social and political contexts but the base or in other words the referent of the right is moral.

This assessment of specific rights claims by the naturalistic conception can be perceived as what Raymond Geuss calls “the ethics-first reading” of the slogan “politics is applied ethics.”⁵⁵³ According to this view, we should start studying politics by first trying to get to what is sometimes called the “ideal theory” of ethics and historically invariant general principles (such as human beings are rational, they seek pleasure and avoid pain, principle of utility, categorical imperative, etc.). Then, in a second step, one can apply that ideal theory to the action of political agents. One can also derive judgments from the theory about how political actors should behave. According to this view, “pure” ethics as an ideal theory comes first. Then comes applied ethics, and politics is a kind of applied ethics.⁵⁵⁴ When the naturalistic conceptions assess whether a specific rights claim is a genuine human right, it is putting into practice this ‘ethics first’ view of politics. According to this perception of politics, the realm of politics is subordinated to ethics; politics is the application of abstract moral or ethical principles (principles of right in this case) to specific contexts. Whether the people in rights struggles are justified in demanding a human right to X is a matter of theoretical resolution; whether there is a human right to X is dictated by the best available moral theory. The practice or actions of political agents come to the picture, at best, as a matter of application of moral principles to specific contexts.⁵⁵⁵ The democratic account of human rights by contrast, takes a principle or procedure of expressing consent and consensus into account in the construction of rights claims in the first place.

In the two cases I discussed in chapter 1, the residents of Dikmen Valley and the TEKEL workers have raised claims to participate in the political structures that they are subjected to and which determine which rights and duties they have. In other words, they are demanding their right to justification. In other words, whatever the object of their right-claims (adequate housing, work, water, natural resources, etc.) the grounds for their demanding those rights are to be respected as beings with dignity that deserve justifications for the structures and conditions they are subject to, the right to ask for such justification and deny bad justifications by resistance. With respect to the case of the right to housing, one can argue that the residents of the Dikmen Valley were not denied their right to justification; they were given the option

⁵⁵³ According to Geuss the slogan “politics is applied ethics” is popular among political philosophers and there can be at least two interpretations of this slogan; an “anodyne reading” and an “ethics-first reading.” The anodyne reading asserts that politics (“meaning both forms of political action and ways of studying forms of political action”) is not and cannot be a value-free enterprise and so is an ethical activity in a general sense. Geuss accepts the anodyne reading but he objects to the ethics-first reading of the slogan. Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), 1.

⁵⁵⁴ *Ibid.*, 6–9.

⁵⁵⁵ I will compare the treatment of specific rights claims by different conceptions of human rights in more detail in chapter 6.

of moving to the newly built houses. It is not the case that their right to justification is not respected but they are pursuing other strategic or prudential interests by resisting and refusing to leave their houses. It is informative to refer to an interview of Tarık Çalışkan, one of the spokespersons of the right to housing movement in Dikmen Valley. He explains that third-parties listening to their struggle might think that they are problem-makers and denying the housing opportunities offered to them by the state authorities.⁵⁵⁶ However, he argues that in the contracts that are offered to them for buying houses there is no clear indication of how much money, for how long and with what interest rate they have to pay in order to buy the houses that are designated to them. So, what they are protesting is not being part of a process of the determination of the conditions and discussion process of a policy which fundamentally affects their lives.

Behind the rights claims in real-life rights struggles, there is a demand for justification of laws and institutions people are subjected to. Participants in these struggles do not find the reasons satisfactory and out of this dissatisfaction they protest at being unjustly treated as citizens and also as human beings. “They may have no abstract or philosophical idea of what it means to be a ‘human being,’ but in protesting they believe that there is at least one fundamental moral demand that no culture or society may reject: the unconditional claim to be respected as someone who deserves to be given justifying reasons for the actions, rules, or structures to which he or she is subject.”⁵⁵⁷ Hence, there is a *deep normative grammar* of social protests and struggles in which concrete demands for justification are associated with the language of rights.⁵⁵⁸ This normative grammar is the conception of the person who has a basic right and duty to justification which serves as a “dynamic normative referent” for struggles for the concrete realization of this right.⁵⁵⁹

6.7 Limitations of the democratic account

Without doubt, it will not be possible to convince everyone about the grounding of human rights on the right to justification (and my interpreting it as a right to resistance). First of all, there is the anti-foundationalist position claiming that the attempt to justify morality—whether it is the idea of justice or human rights— is unnecessary or doomed to failure. Doubts about *grounds* are as old as Thrasymachus’s assertion in Plato’s *Republic* that justice is merely

⁵⁵⁶ Radio interview on Açık Radyo on 28 November 2011, available at http://acikradyo.com.tr/default.aspx?_mv=a&aid=33325 (visited on 31 December 2014).

⁵⁵⁷ Forst, *The Right to Justification*, 209.

⁵⁵⁸ Forst, “The Basic Right to Justification,” 42.

⁵⁵⁹ Cohen, “Rethinking Human Rights,” 599.

whatever the powerful say it is. As Forst claims, as telling as Thrasymachus's claim is, it can only be true as a critical claim and hence the question of the firm ground of justice is posed anew.⁵⁶⁰ Similarly, when one asks questions of why ground human rights, we are back in the game of giving and asking reasons for the justification of human rights. By grounding justice and human rights on the right to justification this question of justification is reflected on itself.⁵⁶¹

One other doubt about the democratic account of human rights might be that it is an empty formal account. It does not say anything about the substance of human rights. It is true that there is an openness to the democratic conception of human rights that it does not give a complete list of human rights and leaves it open for the decision of people who are both authors and subjects of their rights and obligations. To the extent that the principle of justification "includes a *veto* right—against basic norms, arrangements, or structures that cannot be justified reciprocally and generally—democracy is understood as involving not only consensus and agreement but also conflict and contestation. Hence, the term democratic also signifies that the authorship of rights claims is an open process of continuous contestation, transformation and revision rather than a closed system of principles and procedures."⁵⁶² This does not mean that all rights claims including sexist or, fascist claims, etc. count as human rights. This is because the right to justification together with the criteria of generality and reciprocity serve as a filter for claims and reasons that can 'be reasonably rejected'.

One other matter of concern is whether the right to resistance entails the right to violent forms of resistance. The criteria of equality and reciprocity might already suggest that only non-violent forms of resistance are entailed. However, there can be non-ideal circumstances where violent means of resistance can ensure that a discourse is initiated. For instance, in extreme forms of oppression (state oppression of ethnicities, groups) oppressed ethnicities or groups might consider forms of armed resistance as the only way of resistance in order to secure that their right to justification is honored.⁵⁶³ The democratic account of human rights, as developed in this dissertation, does not have the theoretical resources to give a general answer to when violence can be justified or not.

⁵⁶⁰ Forst, *The Right to Justification*, vii.

⁵⁶¹ Knop makes a similar argument against Mouffe's criticism of the reasoned argument in discourse-theory of morality: Mouffe seeks to establish the acceptability of giving reasons. This implies that she assumes that her model of politics (agonistic pluralism) can be established through rational argument. But this is precisely what she criticized deliberative theorists for, Knops, "Debate: Agonism as Deliberation—On Mouffe's Theory of Democracy," 115–116.

⁵⁶² Bağatur, "Toward a Democratic Conception of Human Rights," 9.

⁵⁶³ The case of Anti-Apartheid Struggles in Apartheid South Africa may be considered to be such a case.

6.8 Conclusion

In this chapter I offered a democratic account of human rights which 1) by interpreting the right to justification as taking the form of the right to resistance in rights-struggles incorporates the element of dissent (in addition to consensus) and political contestation into the justification of human rights, hence allows conceptualization of human rights as ‘struggle concepts’ justified in real-life rights struggles, 2) does not make a hierarchy between civil and political human rights and socio-economic rights, whereby socio-economic rights have a lower status (they are derived from civil and political rights), 3) understands human rights as constitutive of democratic politics. This means struggles for rights are part of democracies, democracy understood to include agonistic elements such as conflict, contestation and power struggles. From this perspective, one can think human rights having re-iterated universality: the idea of universality is re-iterated in every particular rights claim as a human right without referring to a fixed substantive content. Furthermore, as a constitutive element of democracy and an open-ended process of collective will formation, human rights are subject to continuous reformulation and transformation. Justification of human rights on the right to resistance allows for conceptualization human rights in a dialectical and dynamic manner.

7 Conclusions

I opened this dissertation by sketching a paradox within the praxis of human rights. Human rights, especially since the second half of the twentieth century, have turned to a *lingua franca* of moral and political claim-making. The language of rights is invoked in various contexts and practices. The philosophical response to this political ‘success’ of human rights has been mixed. Philosophers sympathetic to human rights embarked on a process of ‘tidying’ the concept: cutting out its excesses, bringing determinateness to the concept, specifying the criteria or ‘existence conditions’ of a human right in order to restore its value. Some skeptics, on the other hand, take the strategic uses of human rights, especially their being arsenals of power with imperialistic repercussions, to be a legitimate reason to deny any emancipatory or critical role to a politics of human rights.

My starting point, on the other hand, has been the perspective of those who invoke the language of rights in everyday political constellations and conflicts which I have called real-life rights struggles. Whether they were deprived segments of an urban population asking for their right to the city, peasants or indigenous people claiming their rights to natural resources or workers who have lost their jobs asking for their right to work, participants in these real-life struggles have made moral and political claims for their own rights. In chapter 1, I illustrated such struggles with reference to two struggles for specific rights, namely the struggle for their right to housing of the residents of squatter houses in Dikmen Valley and the protest of TEKEL tobacco workers in Turkey. Therefore, I have not assumed, from the start, the role of a theoretician who tries to bring determinateness to the meaning and usage of a concept in practice. Rather I explored which of the available conceptions could account for these real life struggles and how they can be modified depending on the insights gathered from those practices.

Turning round the question from what theory implies for practice to what practice contributes to the theoretical thinking on human rights, calls for a transformation in the familiar ways of philosophical thinking about the justification and politics of human rights. I have tried to contribute to this transformation by first bringing familiar ways of conceptualizing human rights under critical scrutiny. I provided a taxonomy of the conceptions of human rights by examining them under the groups of *naturalistic*, *political* and *discourse-theoretic* conceptions. I reconstructed the essentials of each conception, examined

the theories of the prominent defenders of each conception and elaborated on the implications for the politics of human rights by testing their position vis-à-vis specific rights claims. In particular, the specific rights claims to housing and work have been a major thread running throughout this dissertation.

The main strategy of the *naturalistic* conception with respect to a specific rights claims has been to authorize the moral theory to decide whether the right in question qualifies as a genuine human right. Whether there is a human right to X is decided depending on the condition of whether X signifies an important interest or essential feature of human beings that requires protection, or if X is implied by the grounding value or basic principle of right designated by the moral theory. Hence, according to the naturalistic approach, the politics of human rights is perceived to be a matter of the *implementation* of pre-political moral rights: i.e. what are the most effective or efficient ways to *implement* moral human rights into practice? How are these abstract moral rights *specified* in practical and historical contexts? The implication of these for the everyday rights struggles would be that if the rights claimed by participants in those struggles are not implied by the best available moral theory, then those people are not *justified* in claiming those rights. These would however invoke the familiar objections: who has the authority to decide what human rights really are and what is their content? Is it legitimate to impose a list of human rights derived from one particular worldview on all people around the world? Things get even more complicated when one takes into account that different moral theories arrive at completely different contents of human rights even from very similar grounds. For instance, both Alan Gewirth and James Griffin defend a notion of agency as the basis of human rights. However, Gewirth defends an expansive list of human rights including the right to work whereas Griffin denies the right to work to be a human right. Last, but not least, there is the objection frequently raised by the defenders of the political conception that human rights are not ahistorical and pre-political moral rights but they are political-legal rights that are incorporated into international law and practice.

For the *political* conception of human rights, on the other hand, the question of whether there is a human right to X is judged depending on the *role* such a right plays within and its incorporation into international law and practice of human rights. Accepting John Rawls's basic insight that different nations might not agree on the *grounds* but on the *role* of human rights, defenders of the political conception hold the view that the main role of human rights is setting standards for state sovereignty violation of which justifies intervention. In my view, this type of *political* approach has some shortcomings especially from the viewpoint of those

who struggle for their rights. First, granted the role human rights play in international relations and politics, this is not their sole role. Human rights also play a role in setting standards of *internal* political legitimacy. This is especially the case for the local struggles for rights. In those cases, whether people are protesting against an urban transformation project which forces them to leave their houses or against a dam or hydroelectric power plant that will impede their access to local water resources, they are raising a (rights) claim in the first instance toward their own government and its policies although there can be third parties involved such as local and multinational companies. Second, and related to the first problem, perceiving human rights as standards of internal sovereignty and legitimate intervention conceptualizes right-bearers as passive *recipients* of rights, rather than active *authors* of them. This is especially apparent when one considers the fact that according to the defenders of the political conception of human rights, human rights and democracy are separate issues and one cannot talk of a human right to democracy. Third, moving to the practice and especially the practice in international relations, the doctrine downplays the moral and critical aspect of human rights as moral aspirations to the extent that the question of the moral justification of human rights is not addressed by the political approach. This invokes one other frequent objection that human rights (without solid moral standards) are vulnerable to ideological use and exploitation, for instance by powerful states for their strategic aims.

Discourse-theoretic accounts steer a middle-ground between political and naturalistic conceptions in as much as they perceive the question of whether there is a human right to X to be a matter of reasonable and mutual agreement of the community of citizens as rights-makers. In this sense, there is an internal and conceptual (not a contingent or merely empirical) connection between democracy and human rights according to discourse-theoretic accounts. Moreover, against the background of the different types of justifications I have delineated, discourse-theoretic accounts of human rights (especially Rainer Forst's account in this respect) provide an intersubjective moral justification of human rights. Thanks to this intersubjective justification of human rights, discourse-theoretic accounts are not vulnerable to individualism and (some sorts of) ethnocentrism objections (i.e. they do not impose one perception of the good life as the grounds of human rights). Although faring better than naturalistic and political conceptions of human rights in accounting for the struggle aspect of human rights, discourse-theoretic accounts have received their share of criticism. What is crucial for my purposes in this research is that discourse-theoretic conceptions relied on rational *consensus* and some accounts (such as Jürgen Habermas's) do not legitimize socio-economic rights directly but in a *derivative* manner. However, when the participants within

the struggles for rights that I have focused on resisted the urban transformation project and defended their right to housing or when tobacco workers resisted losing their social rights due to a change in their contracts, the political and economic content of rights was not separated *a priori*. Rather, whatever the specific objects of the right in question are, their demand within everyday rights struggles signifies the expression of right-claims *politically*.

In this dissertation, I explored the possibility of a transformation in our philosophical thinking on human rights that goes beyond these dominant ways of thinking on human rights transformation not only in terms of a modification in the justification of human rights but also a transformation in thinking of the political role of human rights. In the introduction, I specified two questions that have motivated this dissertation: What does it mean that a person (or a group of people) is *justified* in claiming a right? And, can questions about the nature, content and justification of human rights be taken in a different philosophical manner than the two dominant positions (naturalistic and political conceptions) such that it better illuminates the real-life struggles?

To address the first question—what claiming a right in practice mean—I proposed a differentiation between different modes of justification (section 2.6) and the notion of practices of justification. I have claimed that real life rights-struggles can be understood as concrete practices of justification in which the right to justification is instantiated as a right to resistance to bad (or no) justifications. In addition, I have argued that an intersubjective mode of justification which takes the viewpoint of all people affected by the principles and norms into account, fares better than a monological justification in taking the struggle aspect of human rights into account. In this way, I hope to have shown what it means for a right to be justified as a human right from the viewpoints of those who demand that right.

In order to address the second question—how the nature, content and justification of human rights can be addressed philosophically—I offered a *democratic* account of human rights, which is an alternative to those supplied by the dominant conceptions of human rights in the philosophical literature. It is not an alternative in the sense that it is incompatible with other conceptions of human rights (although it is with some such as those that provide an ethical justification). Rather it is an alternative that focuses on other aspects of human rights such as the struggle aspect of human rights, thereby drawing different conclusions as to how to justify human rights.

As a ground for the democratic account, I suggest a right to justification, which entails a *right to resistance* in non-ideal conditions or within concrete practices of justification. The point of grounding human rights on a notion of resistance is to consider the dynamic role the

politics of human rights plays through negating and contesting exclusions, oppressions and false universals in particular cases in the name of the universals they betray. With the principle of resistance an element of openness is injected into the politics of human rights that allows for continuous reformulation and transformation of the rights claims without losing their moral authority. The contributions to a democratic account of human rights laid out in this dissertation investigated the conditions for a justification of human rights that is not vulnerable to frequently raised charges against the idea of human rights such as individualism, ethnocentrism and the ideology objections and that provides an understanding of the constitutive role of human rights within democratic politics.

Obviously, the approach defended in this dissertation has limitations of its own. First, I do not claim to offer a full account of human rights with a list of human rights. Rather, here I laid down only the underpinnings of a new account of human rights against the background of the alternative approaches. Compared to the critical examination of other approaches, I could touch on some critical aspects of the approach I am defending only too briefly. I hope that these beginnings will be judged worthy of further development. In any case, there are many issues for further research. Important questions include the forms the right to resistance can legitimately take; and the place of civil disobedience and violence in democratic politics against the background democratic account of human rights.

Second, even granted room for further development, the democratic account I am offering, especially its justification, will be vulnerable to objections that condemn any justificatory attempt or appeals to reason as the basis of morality. Although I take such objections seriously and have examined some of them in this dissertation, I do not claim to convince all critics. Neither do I dare to offer solutions to long-lasting problems and controversies within political philosophy in general and within the philosophy of human rights in particular (controversies about the relation between universals and particulars, between morality and politics, about the role of reason, etc.). Starting neither from an abstract 'ideal' notion of human rights nor from a 'realist' empirical conception, what I hope to have achieved is an engagement in 'critical philosophy' by offering an account of human rights that has both moral authority and practical relevance and that is open to continuous critical reflection.

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Samenvatting (Dutch Summary)

De aanspraak op mensenrechten in de politieke sfeer speelt zowel historisch als tegenwoordig een belangrijke rol. De taal van mensenrechten is de *lingua franca* geworden van de emancipatiestrijd en het verzet tegen moderne vormen van exploitatie en onderdrukking, met name sinds de koude oorlog. Dit alomtegenwoordige beroep op de politieke doeltreffendheid van mensenrechten gaat samen met een aanhoudend scepticisme over de emanciperende werking van de term 'rechten'. Dergelijke scepticisme wordt zowel door voor- als tegenstanders van het mensenrechtendiscours geuit. Voorstanders zijn beducht op inflatie en bijbehorende erosie van de mensenrechtenterminologie. Tegenstanders zijn over de hele lijn kritisch over het mensenrechtenkader om verschillende redenen, zoals dat het individualistisch of etnocentrisch zou zijn, of dat het bestaande vormen van overheersing reflecteert en in stand houdt.

Het hoofddoel van dit proefschrift is om een bijdrage te leveren aan de filosofische opgave een theorie over mensenrechten te ontwikkelen met een robuuste rechtvaardiging zonder de relevantie van echte mensenrechtenstrijden uit het oog te verliezen. De vraag hoe een dergelijke theorie uitgewerkt kan worden wordt besproken binnen de kaders van het filosofische debat over mensenrechten. Het bijkomende doel om het strijdaspect van mensenrechten in de theorie te verwerken wordt nagestreefd door te testen hoe de theorieën om kunnen gaan met twee hedendaagse casussen: het recht op arbeid en het recht op adequate huisvesting.

Dit proefschrift is opgedeeld in zes hoofdstukken. In hoofdstuk 1 leg ik de basis voor een filosofische analyse van moderne mensenrechtenpraktijken. Het hoofdstuk concentreert zich op twee rechten: het recht op arbeid en het recht op adequate huisvesting. Ik schets twee recente gevallen van strijd voor deze rechten in Turkije (van Tabaksarbeiders en sloppenwijkenbewoners in de Dikman vallei, Ankara). Mijn hoofddoel in dit hoofdstuk is niet om een gedetailleerde beschrijving en analyse te geven van dergelijke gevallen, maar om praktijkgevallen van mensenrechtenstrijd te illustreren (politieke conflicten en twisten waarbij claims tegen de politieke en sociale orde worden gemaakt op basis van mensenrechten). Op basis van deze gevallen, schets ik een aantal preliminaire theoretische overwegingen, waarbij ik inzoom op de volgende drie punten: het formuleren van mensenrechteneisen door de partijen in het conflict, het rechtvaardigen van een recht in de politieke praktijk, en het aspect van collectieve strijd in het aanspraak maken op sociaaleconomische rechten.

In hoofdstukken 2 en 3 bespreek ik benaderingen die in de Anglo-Amerikaanse traditie als dominant worden beschouwd: respectievelijk de naturalistische en de politieke concepties van mensenrechten. Ik beschouw de algemene eigenschappen en bepaalde prominente versies van de naturalistische en politieke theorieën, zoals die van James Griffin, John Tasioulas, Joseph Raz, Charles Beitz en Thomas Pogge. Tevens kijk ik naar de implicaties van het algemene perspectief op mensenrechten dat de verschillende concepties nemen voor de claim dat er een recht op arbeid en een recht op adequate huisvesting is. Binnen de naturalistische benadering is de vraag "Is er een recht op X?" een theoretische kwestie van het vinden van de juiste principes die deel uitmaken van de beste beschikbare morele theorie waarmee een

theoretische rechtvaardiging van een mensenrechtennorm gegeven wordt. Aanhangers van de politieke benadering claimen dat deze dominante interpretatie van het filosofische project een rechtvaardiging te formuleren voor mensenrechtennormen irrelevant is voor de mensenrechtenpraktijk, of zelfs verstorend werkt. Echter, met ‘mensenrechtenpraktijk’ bedoelen deze schrijvers vooral de plek die mensenrechten hebben binnen het internationaal recht en rechtsleer, en niet de praktijk van mensen die strijden voor mensenrechten.

Dit proefschrift is gemotiveerd met het doel om een nieuw filosofisch perspectief te ontwikkelen dat een morele rechtvaardiging aan mensenrechten geeft en dat tegelijkertijd rekening houdt met het sociale-strijd-aspect van mensenrechten. Om dit doel te bereiken stel ik een modificatie voor van het discours theoretische begrip van mensenrechten.

Discours theoretische concepties stellen mensenrechten en democratie voor als intern verbonden concepten, waarbij mensenrechten de uitkomst zijn van politieke strijd. Mensen zijn hierbij zowel de auteur als het subject van mensenrechten. Als motivatie voor mijn voorstel, beschrijf ik in hoofdstuk 4 de basisinvloeden van Jürgen Habermas’ werk over mensenrechten. In het bijzonder 1) zijn rationele reconstructie van het rechtensysteem binnen constitutionele democratieën, en 2) zijn analyse van de tweezijdige natuur van mensenrechten in relatie tot de wet en moraliteit. De discussie wordt gevolgd door een studie van twee recente discours theoretische posities over mensenrechten van Seyla Benhabib en Rainer Forst.

Hoofdstuk 5 verplaatst de discussie van specifieke mensenrechtentheorieën naar het scepticisme over het idee van mensenrechten in het algemeen en sociaaleconomische rechten in het bijzonder. Deze bezwaren zijn gericht op de kernaannames van mensenrechtentheorieën, zoals het idee dat rechtenprincipes abstract, individualistisch, etnocentrisch of bourgeois zijn. Hoewel er een kern van waarheid zit in deze bezwaren, betoog ik dat het een vergissing is om een algehele kritische positie aan te nemen jegens mensenrechten. Bovendien betoog ik dat een discours theoretische conceptie ten minste sommige bezwaren kan vermijden die naturalistische en politieke concepties aangaan.

Hoewel het de discours theoretische conceptie van mensenrechten beter vergaat dan de naturalistische en politieke concepties als het om het beschrijven van de inter-afhankelijkheid van mensenrechten en democratie gaat, wordt het nog steeds met een aantal problemen geconfronteerd. Eén probleem in het bijzonder in Habermas’ positie met betrekking tot mensenrechten is de afwezigheid van een morele rechtvaardiging van mensenrechten. In hoofdstuk 6 verdedig ik een gewijzigde versie van een discours theoretische conceptie - die ik een democratische theorie noem - die a) de interne connectie tussen democratie en mensenrechten kan beschrijven, en b) mensenrechten fundeert in een specifieke interpretatie van Rainer Forst’s basisrecht tot rechtvaardiging, namelijk, geïnterpreteerd als een recht op weerstand. Habermas’ discoursprincipe is voornamelijk een toestemmingsprincipe; het benadrukt het belang van toestemming van degenen op wie de norm en actie toepassing heeft. Forst’s rechtvaardigingsprincipe omvat ook dispuut, doordat het recht op rechtvaardiging elk moreel persoon een veto recht geeft tegen basisnormen, regelingen of structuren die niet gerechtvaardigd kunnen worden voor hem of haar, wederkerig of in het algemeen. Ik betoog dat het recht op rechtvaardiging, in non-ideale omstandigheden, een recht tot weerstand

omvat: een recht om onrechtvaardige sociale structuren waar men deel van uitmaakt af te wijzen. Een mensenrechtenconceptie gebaseerd op het recht om te rechtvaardigen, waarbij dit recht het recht tot weerstand omvat, geeft niet alleen consensus en overeenkomst maar ook weerstand en conflict een centrale plaats in het denken over zowel mensenrechten als democratie.

In hoofdstuk 7 concludeer ik dat door het theoretische kader dat in de voorgaande hoofdstukken is ontwikkeld toe te passen op de vraag hoe een claim op een mensenrecht wordt aangekaart en gerechtvaardigd in de politieke praktijk, op die manier de democratische theorie het doel van filosofie in het denken over mensenrechten verschuift. De democratische theorie laat zien dat het mogelijk is om te mensenrechten te rechtvaardigen en overdenken zonder eerst de menselijke eigenschappen en noden te identificeren die mensenrechten onderbouwen – als een theoretisch kader dat losstaat van praktische overwegingen. Het laat tevens zien dat het mogelijk is om voorbij te gaan aan het interpretatie van de praktijk in de politieke conceptie van mensenrechten, namelijk dat de praktijk een zaak zijn van internationale relaties en wetgeving. In plaats daarvan wijst het op de rol van mensenrechten in interne politieke legitimiteit. Het theoretische kader dat ontwikkeld is in dit proefschrift laat daarmee zien dat het mogelijk is om een filosofisch perspectief in te nemen dat niet in tegenstelling staat tot de ervaringen van mensenrechtenstrijders, zonder de morele autoriteit van mensenrechten te verliezen.

Curriculum Vitae

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I am a doctoral researcher with an interdisciplinary training in Philosophy and Economics. My research interests are in Normative Political Theory (especially theories of justice and human rights), Institutional Economics and Political Economy.

Education:

- 2010- 2015 PhD in Political Philosophy, Defense: 19 June 2015.
Erasmus University Rotterdam, the Netherlands.
Thesis: *In Defense of a Democratic Account of Human Rights*.
Supervisors: Prof.Dr. Ingrid Robeyns and Dr. Constanze Binder.
- 2008-2010 Research Master in Philosophy and Economics.
Erasmus University Rotterdam, the Netherlands.
Thesis: *Are Markets Morally Free Zones?* (Supervisor: Prof. Dr. Ingrid Robeyns).
- 2004-2007 Master of Science in Economics.
Middle East Technical University, Ankara (Turkey).
Thesis: *Engendering Consumption* (Supervisor: Prof.Dr. Onur Yıldırım).
- 2000-2004 Bachelor of Science in Economics, Middle East Technical University, Ankara.
- 2001-2004 Minor in History of Philosophy, Middle East Technical University, Ankara.

Previous appointment:

- January 2006 – September 2006 Research Assistant – Department of Economics.
Pamukkale University, Denizli (Turkey).
- September 2006-December 2007 Research Assistant – Department of Economics.
Middle East Technical University, Ankara (Turkey).

Publications:

- “Toward a Democratic Conception of Human Rights,” *Theoria and Praxis: International Journal of Interdisciplinary Thought* 2, no. 1 (2014).
- Review of , Amartya Sen’s *The Idea of Justice*,” *Feminist Economics* 19, no. 2 (April 2013): 144–148.
- Review of Allen Buchanan’s *The Heart of Human Rights, Ethical Perspectives*, forthcoming.

Scholarships:

- The HSP Huygens Grant (≈€73k) for PhD in Philosophy at Erasmus Rotterdam University for the period September 2010-August 2014.
- The HSP Huygens Grant (≈€28k) for Research Master in Philosophy and Economics at Erasmus Rotterdam University for the period January 2008-December 2009.

Some International talks, courses, workshops and seminars attended:

Presentations:

- *The right to resistance as the fundamental human right*, Workshop on 'Resistance , Disobedience and Coercion', Bilkent University, Ankara (Turkey), May 21-22 2015.
- *Toward a constructivist conception of human rights: Beyond the naturalistic versus political dichotomy?*, OZSW Conference, Rotterdam (the Netherlands), November 16-17 2013.
- *Toward a constructivist conception of human rights*, Cosmopolitanism and Conflict Conference, Rome (Italy), October 11-13 2013.
- *Toward a constructive conception of human rights: beyond the naturalistic versus political dichotomy?*, The Faculty of Philosophy Lunchtime Seminars, Rotterdam (the Netherlands), June 6, 2013.
- *Human Rights Politics: Insights from the Right to Housing Movement in Dikmen Valley District in Ankara-Turkey*, The Many: History, Theory, Politics Conference, Lisbon (Portugal), 18-20 April 2012.
- *The Political Conception of Human Rights*, PhD Students Workshop Presentation at EIUC Venice Academy on Human Rights, Venice (Italy), July 11-16 2011.
- *In Defense of a Historical and Institutional Approach to Markets and Their Moral Boundaries*, EIPE PhD/Research Master Seminar, November 23, 2009.

Schools and courses attended (with credits & certificates):

- Summer School - *Feminist Critical Analysis: Re/Producing, Consuming, Engendering* - Inter University Centre , Dubrovnik, Croatia, 19-23 May 2008.
- Winter School- *Ethical Theory and Moral Practice*, Onderzoekschool Ethiek (OZSE), Barchem, the Netherlands, 14-18 March 2011.
- Venice Academy of Human Rights- *Human Rights and the Cosmopolitan Idea(l)*, EIUC (European Inter-University Centre) for Human Rights and Democratisation, Lido Venice, Italy, 11-16 July 2011.
- Course- *Political Philosophy of Human Rights*, Onderzoekschool Ethiek (OZSE), Utrecht, the Netherlands, 10 May-7 June 2012.
- Course/Masterclass with Samuel Moyn-*Human Rights in History*, Huizinga Instituut (Research Institute and Graduate School of Cultural History), Amsterdam, the Netherlands, October 9 2013.
- Lucerne Masterclass with Prof. Nancy Fraser- *Crisis, Critique, Capitalism*, Graduate School of Humanities and Social Sciences, University of Luzern, the Switzerland, 14-18 October, 2013.
- Symposium with Jürgen Habermas- *The Future of Democracy*-Huizinga Instituut (Research Institute and Graduate School of Cultural History), Amsterdam, the Netherlands, November 20 2013.

Teaching experience:

- Erasmus School of Economics (ESE), Erasmus University Rotterdam, 2015.
Tutorials Philosophy of Economics (Dr. Attilia Ruzzene, Dr. Constanze Binder, Dr. Conrad Heilmann).
- OZSW Research Master Winter School, Erasmus University Rotterdam, 2014.
A Basic Income for All: A Policy Proposal for Distributive Justice (jointly with Willem van der Deijl).
- Erasmus Institute for Philosophy and Economics (EIPE), 2010.
Introductory Seminar for the Research Master Students *What's Philosophy of Economics at EIPE?* (jointly with François Claveau, Luis Mireles Flores and Attilia Ruzzene).
- Department of Economics, Middle East Technical University, 2007.
Tutorials Economy, Society and Civilization (Prof. Dr. Onur Yıldırım).
- Department of Economics, Middle East Technical University, 2006.
Tutorials Introduction to Economics (Assoc.Prof.Dr. Gül İpek Tunç).

Service to the profession:

- Referee for Erasmus Journal of Philosophy and Economics (EJPE).
- Referee for Erasmus Student Journal of Philosophy (ESJP).
- Co-organizer of the Graduate Conference in Philosophy of Science (jointly with Attilia Ruzzene and François Claveau), Rotterdam 8-9 March 2012.
- Co-organizer of the Public Lecture and Book Symposium with Rainer Forst (jointly with Sem de Maagt), Erasmus University Rotterdam 7-8 March 2013.

Languages:

Turkish (native), English (fluent), German and Dutch (beginner).